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In the

Supreme Court of the United States

October Term, 1985

JAPAN WHALING ASSOCIATION and JAPAN FISHERIES ASSOCIATION

Petitioners,

vs.

AMERICAN CETACEAN SOCIETY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas from which Japan is lawfully exempt, the Japanese nationals are "diminish[ing] the effectiveness" of the international convention under which the quotas were established, even though:

> (a) The taking of whales was in reliance on and in accordance with an agreement between the United States and Japan;
>
> (b) by that agreement Japan undertook to cease commercial whaling operations in 1988 and to phase down its operations in the interim; and
>
> (c) on the basis of these undertakings and scientific evidence the Secretary concluded that the interim takings would not "diminish the effectiveness" of the international convention within the meaning of the United States statutes.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute that he is charged with administering when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose a severe punitive sanction on Japanese nationals for actions taken in reliance on that agreement.

THE PARTIES

The petitioners, named in the caption, were defendant-intervenors and appellants below. The plaintiffs and appellees below, respondents in this Court, are -- in addition to the American Cetacean Society named in the caption -- Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center. The defendants and appellants below, nominally respondents insofar as this petition is concerned, are Secretary of Commerce Malcolm Baldrige and Secretary of State George Shultz.

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vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Japan Whaling Association and Japan Fisheries Association respectfully pray that a writ of certiorari issue to review the judgment of the court of appeals entered in this case on August 6, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 768 F.2d 426 and

are annexed hereto as Appendix A. The district court opinion is reported at 604 F. Supp. 1398 and is annexed hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1985. A timely petition for rehearing and suggestion for a rehearing *en banc* was denied on October 11, 1985. The order denying rehearing is annexed hereto as Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

In Appendix D there are set forth, in full, the agreement of November 13, 1984, between the United States and Japan (the Murazumi-Baldrige Agreement) and a supplement to that agreement; and, in relevant part, provisions of the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, of the so-called Pelly Amendment, 85 Stat. 768, 22 U.S.C. § 1978(a), and of the so-called Packwood-Magnuson Amendment, 90 Stat. 337, 16 U.S.C. § 1821(e)(2).

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would place the United States in breach of an agreement with Japan. In that agreement, Japan made irrevocable concessions, satisfactory to the responsible

Executive Branch official, intended to avoid precisely the punitive sanction that the court's order would force the Executive Branch to impose.

This extraordinary exercise of judicial power arises out of a controversy over commercial whaling operations. The International Whaling Commission (IWC), established under the International Convention for the Regulation of Whaling (ICRW), has fixed quotas that diminish to zero next year for the commercial harvest of certain species of whales. Japan, a party to the Convention, has filed formal objections to these quotas. These objections exempt Japan from the quotas and relieve it of any obligation at international law to abide by them.

United States domestic statutes, the so-called Pelly Amendment and Packwood-Magnuson Amendment, call for the Secretary of Commerce to determine whether nationals of a foreign country are conducting whaling operations in a manner or under circumstances which "diminish the effectiveness" of the ICRW. A certification by the Secretary that foreign nationals are so conducting their whaling operations results in a severe sanction, a reduction of at least 50 percent in the quantity of fish its nationals can take in United States waters. Such a sanction would cost Japanese fishing interests $1.8 billion.

Although Japan is lawfully exempt from the quotas, the Secretary of Commerce apparently believed himself empowered to certify the whaling operations of Japanese nationals if he determined that their taking of whales in excess of the quotas would diminish the effectiveness of the ICRW. Therefore, in order to avoid a diplomatic confrontation with the United States, Japan

negotiated and concluded an agreement with the Secretary, acting for the United States. The United States undertook that there would be no certification, in exchange for major pro-whale conservation undertakings by Japan. Japan agreed (1) to withdraw its formal objections to the IWC quotas; (2) to limit its harvest of whales over the next two years to numbers that, upon scientific evidence considered by the Secretary, would not endanger the species of whales involved; and (3) to cease commercial whaling altogether in 1988. In partial performance of its agreement, Japan has withdrawn one of its quota objections, which under the ICRW is an irrevocable act.

The judgment of which review is sought rests on the holding that when Japanese whalers, under authorization of their government granted in explicit reliance on the agreement between the United States and Japan, take whales in excess of the international quotas, they are *ipso facto* engaging in conduct that diminishes the effectiveness of the ICRW. It would direct the Secretary of Commerce so to determine and certify, and thus automatically trigger severe economic sanction against Japan and its fishermen. It would direct the Secretary to make such a certification despite the fact that Japan is not bound by the quotas and despite the Secretary's determination that the limited interim whale harvest by Japan would result in no diminution of the effectiveness of the international whaling regime, especially in light of the large concessions made by Japan in its bilateral agreement with the United States.

The Convention and the Whale Quotas

The International Convention for the Regulation of Whaling, signed in 1946 and entered into force for the United States in 1948, established an international system of whale harvest management. Its purposes and objectives are "to protect all species of whales from further overfishing" while recognizing that "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales that may be captured without endangering these natural resources." Conservation measures were to be undertaken "without causing widespread economic and nutritional distress . . . and thus [would] make possible the orderly development of the whaling industry." International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, Preamble (App. D13-14).

The International Whaling Commission created by the ICRW establishes and includes in its so-called "Schedule" such matters as annual whaling quotas, the whaling seasons, and regulations governing permissible whaling methods. All amendments to the Schedule, including whaling quotas, must comply with Article V-2 of the ICRW, which requires, *inter alia*, findings that an amendment (1) is "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) is "based on scientific findings," and (3) "take[s] into consideration the interests of the consumers of whale products and the whaling industry." (App. D14.)

Under the terms of Article V-3 of the ICRW, any government that presents an objection to the IWC within 90 days of being notified of the adoption of such an amendment is exempt from the new quota or other regulation. The right to present an objection is absolute and unqualified. (App. D14-15.)

In 1981, the IWC amended the Schedule for the western division stock of North Pacific sperm whales to establish what was effectively a zero catch limit. The IWC adopted this amendment without making the three findings that Article V-2 of the ICRW requires. On November 9, 1981, Japan filed a timely objection to this amendment. Thereafter, the IWC reconsidered and agreed to allow Japan to take 450 sperm whales in the 1982-83 coastal season (the sperm whale season has historically run from August of each year through March of the following year) and 400 sperm whales in the 1983-84 coastal season. The IWC failed to establish a quota for any period thereafter, thereby resurrecting for Japan (and maintaining for other countries) the zero catch limit for succeeding years. Japan's 1981 objection was still in force as to this zero catch limit so that it was free to take sperm whales in the 1984-85 season and thereafter without violating the ICRW.

In 1982, the IWC imposed a five-year moratorium on all whaling beginning in 1986. Japan, along with the Soviet Union and Norway, filed an obiection to this action.

The United States Statutes

Two United States statutes bear on this case. In 1971, Congress enacted the so-called Pelly

Amendment to the Fishermen's Protective Act, which is Section 8(a) of that statute. 85 Stat. 768, 22 U.S.C. § 1978(a) (App. D16-17). Its operative provision reads:

> [8](a)(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

The President, upon receipt of certification by the Secretary of Commerce, is authorized by Section 8(a)(3) to direct the Secretary of the Treasury (the Customs Service is a Treasury agency) to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade.

In 1979, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, as Section 201(e)(2). 90 Stat. 337, 16 U.S.C. § 1821(e)(2) (App. D18). The Packwood-Magnuson Amendment deals specifically with whaling and with the ICRW. It provides for an automatic sanction, the reduction of at least 50 percent of a country's allocation of fish that it can harvest in the United States fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that diminishes the effectiveness of the ICRW.

Certifications under either the Pelly Amendment or the Packwood-Magnuson Amendment have been rare, and sanctions have been imposed only once. In the usual case, the possibility of United States certification and sanction has led to negotiations between the United States and a country whose nationals are suspected of activity that diminishes the effectiveness of the ICRW (or some other ocean resources conservation program), and to the conclusion of an agreement that, in the view of the United States, furthers conservation objectives, thereby eliminating the need for sanction. And that is what happened here.

The Murazumi-Baldrige Agreement

Before the 1984-85 whaling season, Japan entered into discussions with United States officials, including the Secretary of Commerce and the Secretary of State, in an attempt to resolve differences between the two nations over whaling issues. These discussions resulted in an exchange of letters between Yasushi Murazumi, charge d'affaires of Japan in the United States, and the Secretary of Commerce. (App. D1-8.)

One part of their agreement concerns the sperm whale quota specifically. Japan agreed to withdraw its objection to that quota, and the United States agreed in exchange that the Japanese could take up to 400 sperm whales in each of the 1984-85 and 1985-86 coastal seasons without "diminish[ing] the effectiveness" of the ICRW. Secretary Baldrige described in a letter to Minister Murazumi the United States' understanding and the bases for it (App. D6-7):

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvest of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter [*i.e.*, 400 sperm whales in each of the 1984 and 1985 seasons] would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.
>
> The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes.

On December 11, 1984, the Government of Japan, pursuant to its undertaking in the Murazumi-Baldrige Agreement, filed a withdrawal of its objection to the sperm whale quota effective April 1, 1988. This withdrawal, by the terms of the ICRW, is irrevocable. (*See* App. A4.)

There is a second, longer-range part of the Murazumi-Baldrige Agreement. Japan agreed to end all commercial whaling by April 1, 1988. The United States, on its side, agreed that the Japanese may take up to 200 sperm whales in each of the 1986-87 and 1987-88 coastal seasons and may take minke and Bryde's whales in those years subject to limitations approved by the United States and

Japan, without imposition of the sanction provided by the Pelly and Packwood-Magnuson Amendments. Japan, by a diplomatic note dated April 5, 1985 (App. D9-12), has confirmed that, within five days of a judgment in this case in favor of the United States, it will withdraw its objection to the IWC moratorium, effective April 1, 1988, and thereby commit itself irrevocably to the cessation of commercial whaling.

Members of the petitioner Japan Whaling Association have taken whales in accordance with the Murazumi-Baldrige Agreement beginning last fall. Throughout the pendency of this litigation and in spite of the adverse decisions below, petitioner JWA's members have strictly adhered to the limitations of the Murazumi-Baldrige Agreement.

The Proceedings Below

This action was brought in November 1984 before agreement was reached between the United States and Japan. The plaintiffs are twelve animal welfare and conservation organizations and a former United States deputy commissioner to the IWC. The defendants are Secretary of Commerce Baldrige and Secretary of State Shultz. These petitioners, the Japan Fisheries Association and the Japan Whaling Association, intervened as a matter of right on the side of the two United States Cabinet officers.

The district court, Judge Richey, heard the case on cross-motions for summary judgment by each of the three parties after the Murazumi-Baldrige agreement was concluded. Judge Richey granted the plaintiffs' motion. He held that the phrase "diminish the effectiveness" of the ICRW as used in

the Pelly and Packwood-Magnuson Amendments means, in the context of this case, any taking of whales in excess of an ICRW quota. (App. B2.) In Judge Richey's view, the statutes preclude the exercise of judgment by the Secretary of Commerce; he must certify whenever nationals of a country have exceeded an ICRW quota, whatever the circumstances. The district court's judgment therefore directed the Secretary of Commerce to make a certification, in violation of the agreement that the Secretary himself had concluded with the Government of Japan, which would result in the automatic imposition of the Packwood-Magnuson sanction on Japan and its fishing industry.

The court of appeals stayed the district court's judgment and heard the appeal on an expedited basis. It affirmed, agreeing with "the District Court's ultimate conclusion that certification in this case is mandatory, though . . . for slightly different reasons." (App. A2.) On the basis of statements made during the course of congressional consideration of the Pelly and Packwood-Magnuson Amendments, the court of appeals held that, "although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas." (App. A2-3.) Judge Wright's opinion to this effect was joined by the late Judge Tamm.

District Judge Oberdorfer, sitting by designation, dissented. He said that he could not agree that, "in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it." (App. A39.) He also

expressed his doubt that the case, which resulted in "add[ing] the Judicial Branch's voice to this delicate process" of conducting foreign affairs (App. A43), was justiciable; he said further that, even granting justiciability, the equities required that the court abstain from exercising its powers in this situation.

Petitions for rehearing with suggestions for rehearing *en banc* were filed. Four of the seven active circuit judges who considered the *en banc* suggestions stated their "substantial agreement with the views expressed in Judge Oberdorfer's dissent" and would have granted the requested *en banc* rehearing. (App. C4, C8.) Two active circuit judges did not participate. Rehearing *en banc* therefore was denied for want of the majority of all the circuit judges in regular active service, including non-participants, that the court below requires in applying Fed. R. App. P. 35(a).

REASONS FOR GRANTING THE WRIT

A divided panel of the court of appeals has affirmed a judgment of the district court the effect of which is to place the United States in flagrant breach of an international agreement. The agreement is one that would further the United States interest in the conservation of whales because under it Japan would cease all commercial whaling in 1988. In breach of its agreement, the United States would be obliged by the judgment below to reduce by at least half Japan's fishing privileges in United States waters, a sanction that would cost Japanese nationals $1.8 billion. The sanction would result from Japan's reliance on its agreement with the United States in authorizing members of the petitioner Japan Whaling

Association to take whales in numbers to which the United States had agreed.

We leave to the Solicitor General fully to develop, in his separate petition, the need for this Court to review a federal court judgment that trenches so deeply on the conduct of foreign affairs by the responsible branch of government, the Executive Branch. These petitioners emphasize the importance of the case that derives from the threat that the United States must impose punitive sanction on them and their government for conduct in which they engaged in perfect good faith, relying on the solemn public promise of the United States. Only this Court can restore the United States to the ranks of those "great nations" that, Justice Black once reminded us, "like great men, should keep their word." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion).

The legal issues posed by the case are important in their own right, and the resolution of them by the court below is inconsistent with decisions of this Court. Four judges of the court of appeals, a majority of the judges who participated in the *en banc* vote, thought that the issues were wrongly resolved by the court's panel majority. The "substantial agreement" of these four circuit judges with the views of the dissenting judge, who had no vote in the *en banc* decision, accentuates the necessity for this Court's intervention to ensure respect for its precedents as well as to judge the propriety of the court's remarkable foray into foreign affairs.

The court of appeals held that as a matter of its independent construction of the Pelly and Packwood-Magnuson Amendments Japanese nationals necessarily "diminish the effectiveness" of

the ICRW when they take whales in excess of an ICRW quota by which their country is not bound. The Secretary of Commerce determined on the other hand that, considering the circumstances of the case, including the major whale-conservation concessions that Japan had made and the scientific evidence before him, Japanese whaling within the limits of the Murazumi-Baldrige Agreement would not "diminish the effectiveness" of the ICRW within the meaning of the statutes he administers.

The substitution by the court of appeals of its reading of "diminish the effectiveness" for the Secretary's reasonable if not clearly correct interpretation of the phrase is inconsistent with the numerous decisions of this Court that demand deference to an administering agency's reasonable interpretation of a statute. The inconsistency is heightened in the context of this case, for the scope of executive discretion in administering statutes is largest when the Executive is acting in its special province, foreign affairs. Moreover, the ruling that the statutes require that Japan be subjected to United States sanction for exceeding international whale quotas from which it is exempt by the very terms of the whaling convention to which it and the United States are parties raises a serious question under decisions of the Court calling for the United States to adhere to its treaty commitments in the utmost good faith. Finally, the statutes as construed below would have the United States Congress delegating decisionmaking power to an international body. That construction should be avoided, under this Court's decisions, to avert constitutional doubts.

There is a further question, which goes beyond statutory construction. Judge Oberdorfer, dissenting below, thought that there are serious

questions of justiciability in this case, which involves a matter at the heart of the conduct of the foreign relations of the United States, the integrity of its international agreements. This Court should decide whether, regardless of the right-and-wrong of the statutory question, a court of the United States may or should enter an affirmative injunction in the nature of mandamus commanding a Cabinet officer to breach his very own agreement and impose sanction on a friendly nation that (a) sought to avoid such sanction by making major concessions in the agreement with the United States and (b) in reliance on that very agreement took the actions that, by the decision below, will result in sanction.

I. THE STATUTORY QUESTION

A. Deference Is Owing to the Secretary's Interpretation of the Statute.

The statutes in issue call for a determination by the Secretary of Commerce whether nationals of a foreign country "are conducting fishing [in this case, whaling] operations in a manner or under circumstances which diminish the effectiveness" of an international fishery conservation program, in this case the ICRW. (App. D16, D18.) They do not say that the Secretary is merely to make a mechanical determination whether such nationals have exceeded an ICRW quota in their taking of whales. Congress instead used a phrase, "diminish the effectiveness," of an apparent breadth suitable for a statute administered by a Cabinet officer. Congress underscored its intent to confer on the Secretary discretion appropriate to his office and to the international subject matter of the statutes by not undertaking itself to define the phrase. The statutes thus seem plainly to entail the exercise of

judgment by the Secretary before he makes the certification that, in the case of the ICRW, calls for the most severe automatic sanction on another country.

The Secretary of Commerce in this case satisfied himself that the taking by Japanese whalers of the number of whales allowed under his agreement with the Japanese charge d'affaires would not diminish the effectiveness of the ICRW, even though that taking exceeded ICRW quotas. He thus construed the statutes as enabling him to make a judgment based on all the circumstances and not to be required, as the court below held that he was, to certify any foreign country whose nationals are exceeding ICRW quotas. On the face of the statutes, the Secretary's reading of the undefined statutory phrase seems the correct one. It is at the very least a reasonable one.

This Court has frequently admonished the lower courts in recent years that, when a statute speaks in such general terms as the Pelly and Packwood-Magnuson Amendments do, courts should respect the administrator's interpretation if it is reasonable. In *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), the Court described the proper approach to a statutory issue when the administering agency has spoken to the meaning of the statute.

In that case, Congress had not defined the meaning of "source" as used in the Clean Air Act in respect of the establishment of new source performance standards in a nonattainment area. The Environmental Protection Agency had adopted a definition that the court of appeals -- the same court of appeals whose judgment is the subject of

this petition -- found to be "inappropriate," and for which it therefore substituted its own definition. This Court reversed. It said, first, that a reviewing court must of course "give effect to the unambiguously expressed intent of Congress" without regard to the administrator's reading of the statute. *Id.* at 2781-82. It cannot be said here that "diminish the effectiveness" (even as illuminated by the secondary sources to which the court below turned for illumination) "unambiguously" expresses the intent that the taking of a single whale or fish in excess of a quota must be certified for the imposition of sanction. Indeed, if anything, it expresses the unambiguous intent to confer on the Secretary the discretion he exercised.

The Court in *Chevron* said second that, where a statute is "ambiguous," the question for a reviewing court is not what is the best resolution of the ambiguity; rather, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. The Court added, seemingly apropos a case such as this where Congress has charged a high-ranking official with administering a broadly-phrased standard: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id. See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1109 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

This is the paradigm case for deference to a reasonable administrative interpretation (if not for affirming the Secretary's interpretation as clearly correct). As the opinion below acknowledges, Congress did not define what conduct should be considered to "diminish the effectiveness" of the ICRW and thereby trigger certification and sanction. Judge Wright found the basis for his definition not in the words of the statutes but in items that he cited from their legislative history. (App. A20-36.) The history, even as it is recited in his opinion, is not compelling. A history with such conflicting strands cannot be made the basis for saying that Congress had on the specific point at issue the unambiguous intent that the court below attributed to it. No more can it be said that, in the absence of such a clear intent, the Secretary's interpretation of Congress' undefined words was not reasonable.

B. Especially Great Deference Is Owing Because This Case Involves the Conduct of Foreign Affairs.

Judge Oberdorfer, dissenting below, found in the majority's analysis of the legislative history "an impressive, but far from conclusive, demonstration that congressional sponsors of the Pelly Amendment intended that the Secretary certify any deviation by a nation or its nationals from a Commission quota." (App. A45.) He pointed to ambiguities and uncertainties in the very history cited by the majority that left it unclear -- at worst -- whether any of the congressional sponsors would have intended that in the circumstances of this case Japan should be certified as diminishing the effectiveness of the ICRW. But he said that, despite these infirmities, he might be able to endorse the majority's decision based on secondary

evidence of the congressional intent if solely domestic affairs were involved. (App. A46.)

That was not this case, however. It involved international relations. More even than in the usual domestic case, courts are bound to defer to the Executive Branch reading of statutes that bear on the conduct by Executive Branch officials of the foreign affairs of the nation. (*See* App. A45-47.) Foreign affairs is the province of the Executive Branch. The issue in the leading case on this subject, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), was the validity of a congressional delegation of power to the Executive in a foreign affairs matter. This Court remarked that "if, in the maintenance of our international relations, embarrassment -- perhaps serious embarrassment -- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* at 320.

Congress enacted the Pelly and Packwood-Magnuson Amendments with the understanding that it was legislating concerning executive action "within the international field." (*See* App. A32 n.20 (remarks of Rep. Breaux)). Certainly President Carter, whose signature made the Packwood-Magnuson Amendment law, understood that, as the final actor in the legislative process, he was not confining his Cabinet officers to the ministerial function the court below assigns to the Secretary of Commerce. In signing the bill that included the amendment he said: "With regard to both the Packwood-Magnuson and Pelly Amendments the

Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation." 15 Weekly Comp. Pres. Doc. 1435 (Aug. 15, 1979). That presidential statement, ignored by the court below, is more nearly to the point than any of the items of legislative history it cited.

C. Application of the Statutes to Japan Derogates United States Treaty Obligations.

Japan has an unchallenged and unchallengeable right to free itself of quotas established by the IWC by filing objections to them. It has exercised this right in the case of the quotas that are at issue. Nevertheless, the court below has construed the statutes as requiring United States officials to impose sanction on Japan for exceeding those quotas. In doing so it relied on statements of sponsors of the Pelly and Packwood-Magnuson Amendments to the effect that Congress meant the Secretary to certify nations that "fl[ou]t" or "ignore" or "flagrantly violate" international quotas. (App. A22 & n.13.) But Japan could not violate the quotas because, by its objections, the quotas were not applicable to it. Neither did it flout or ignore them. It took them seriously into account and has now, in performance of its agreement with the United States, withdrawn irrevocably one of its objections and committed itself to the withdrawal of the other. It is most doubtful that any of the sponsors whose statements were relied on below had in mind any such behavior when they were describing the conduct that the Secretary was to certify as "diminish[ing] the effectiveness" of the ICRW.

Beyond that, however, the statute should not be construed to reach Japan's conduct because to do so results in a construction that is inconsistent with rights secured by a treaty to which the United States is a party. A century ago this Court said that "the court ought, if possible, to adopt the construction [of a statute] which recognized and saved rights secured by the treaty." *Chew Heong* v. *United States*, 112 U.S. 536, 549 (1884). Japan has a right, secured by the very treaty with which we are concerned, to exempt itself from treaty quotas. A construction of the Pelly and Packwood-Magnuson Amendments that requires the imposition of sanction on Japan for acting inconsistently with quotas from which it thus exempted itself is not a construction that saves and recognizes rights secured by the treaty. It is destructive of such rights.

The court below said that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations, even when those regulations are not binding on the member." (App. A5 n.1.) Of course the Convention does not say that in so many words. This Court, however, has consistently held that treaties should be interpreted in a spirit of "*uberrima fides*," that is, with the most scrupulous good faith. *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). *Accord Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928). It is not consistent with the utmost good faith to agree with a treaty partner that he may, so far as the treaty is concerned, engage in certain conduct and then undertake to punish him for precisely that conduct. Congress of course may abrogate a prior existing treaty agreement, but if it is to do so, it must do so

expressly. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984). Neither the Pelly Amendment nor the Packwood-Magnuson Amendment provides expressly for any such abrogation.

D. The Court of Appeals Construction of the Statutes Results in an Impermissible Delegation of Decisionmaking Power.

Under the construction adopted below of the Pelly and Packwood-Magnuson provisions, "discretion is vested in the international body rather than in the member nations." (App. A35.) Thus, according to Judge Wright, whenever the IWC exercises its discretion and prescribes a zero quota or a moratorium, the Secretary of Commerce, acting under a statute that provides "enforcement leverage" for the IWC (App. A4), has no discretion. He must certify any nation once he has determined that nationals of that country have taken a single whale. Upon such certification the Secretary of State must automatically impose the severe Packwood-Magnuson sanction. So construed, the Pelly and Packwood-Magnuson provisions amount to an unconstitutional delegation of sovereign power to an international entity.

Congress has apparently never attempted such a delegation of power to an international organization as the opinion below ascribes to it in this case. Consequently, there are no decisions squarely on point. This Court has recognized, however, that "[t]he powers of Government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered." *The*

Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

Moreover, if Congress may not constitutionally delegate legislative power to executive officials without adequately defining how the power is to be exercised, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), the delegation of power to an international body, like delegation to private persons, *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 310-12 (1936), is unconstitutional.

Just recently, an opinion announcing the judgment of this Court cautioned against statutory interpretations that "would make such a sweeping delegation of legislative power that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion). *See also id.* at 672-76 (Rehnquist, J., concurring).

II. THE QUESTION OF JUSTICIABILITY AND EQUITABLE DISCRETION

The majority opinion below scarcely took account of the gravity of the foreign affairs context in which it acted to direct the conduct of Executive Branch officials. The court did note that it was "urged that deference to the Executive is particularly apt and intrusion by the judiciary particularly inapt in the foreign affairs context." (App. A37.) By way of answer, it merely cited, first, Congress' power to regulate foreign commerce

and, second, *Marbury* v. *Madison*, 1 Cranch 137 (1803), for the proposition that "the judiciary's role is to declare what the law is when Congress has acted." (App. A37-38.) It gave no consideration to whether this is such a case as calls for judges to declare what the law is or, if it is, whether it was appropriate even so for the judges to enter orders telling Executive Branch officials what they must do, to the extent of acting in breach of their own solemn international undertakings. This Court should consider the propriety of a court's hearing a case that involves such delicate questions of international relations and of issuing mandatory equitable relief that has such consequences.

A. Courts Should Not Entangle Themselves in Delicate Issues of Foreign Relations.

The dissenting judge below, with whose views four circuit judges expressed their substantial agreement, thought it open to serious question whether this case presents a justiciable issue. Judge Oberdorfer cited and quoted from opinions of this Court, including the Court's warning in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), about "embarrassment from multifarious pronouncements by various departments on one question." This Court has declared that "the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Here, the President's subordinates have spoken by giving their word to Japan in exchange for its concessions on the taking of whales. Nevertheless, the Judicial Branch has now ordered that the Secretary dishonor the nation's word.

It was that word "upon which Japan relied in withdrawing its objection to the 1981 quota" (App. A43) and in allowing the members of the petitioner JWA to conduct whaling operations during the 1984-85 season, the operations for which the Secretary must now certify Japan and thus subject it and its fishermen to severe sanction. There is a serious question whether any United States court should involve itself in a case that can eventuate in the issuance of such an order.

B. In the Exercise of Equitable Discretion the Judiciary Should Not Compel the Executive to Dishonor an Executive Agreement.

Even if such a case should be thought technically justiciable, there are equitable considerations that argue against the issuance of the mandatory order in this case. In disregard of this Court's controlling decisions, the court below took no account of these considerations . The order, whether or not technically termed mandamus, is in the nature of mandamus, compelling an Executive Branch official affirmatively to take certain action. It is doubtful that the case satisfies the traditional mandamus requirement that the judicially enforceable duty be plain and ministerial. The statutes on their face either plainly confer on the Secretary of Commerce the discretion he exercised or, at worst, are uncertain. The court's finding that the Secretary has a ministerial duty was based not on the words of the statutes but on debates recorded in the Congressional Record.

Even if traditional mandamus criteria did not require the courts below to stay their hands, this

was a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' . . ." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. *See also Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong. As Judge Oberdorfer said, they "weigh heavily in favor of the Secretary." (App. A48.) "The ultimate equity," said Judge Oberdorfer, "is that the United States, speaking through the Secretary of Commerce, has given its word in apparent reliance on the language of an Act of Congress," and "Japan has made a reciprocal promise in reliance on the same language and the Secretary's interpretation of it." (*Id.*) The courts below disregarded that "ultimate equity" when they misused the Chancellor's power to compel the United States to dishonor its word and to do so at the expense of a friendly nation that relied on its

citizens. Small wonder that four circuit judges expressed their substantial agreement with Judge Oberdorfer's dissent from that action. This Court alone can now rectify the wrong that has been done.

CONCLUSION

This Court should review the unprecedented foray of the courts below into foreign affairs. The decision below threatens not only to disrupt United States-Japanese relations, but also to cast in doubt the integrity of the Government of the United States in the world community. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5251

AMERICAN CETACEAN SOCIETY, *et al.*

v.

MALCOLM BALDRIGE, Secretary of Commerce, *et al.*, APPELLANTS

JAPAN WHALING ASSOCIATION, *et al.*

No. 85-5252

AMERICAN CETACEAN SOCIETY, *et al.*

v.

MALCOLM BALDRIGE, Secretary of Commerce, *et al.*

JAPAN WHALING ASSOCIATION, *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 84-3414)

Argued May 16, 1985

Decided August 6, 1985

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Dianne H. Kelly, Attorney, Department of Justice, with whom *F. Henry Habicht, II*, Assistant Attorney General, *Donald A. Carr* and *Martin W. Matzen*, Attorneys, Department of Justice, and *Robert J. McManus*, Attorney, Department of Commerce, were on the brief, for the federal appellants.

Scott C. Whitney, with whom *Steven R. Perles* was on the brief, for appellants Japan Fisheries Association and Japan Whaling Association.

James A. Beat, with whom *William D. Rogers* and *John F. Libby* were on the brief, for appellees.

Before WRIGHT and TAMM, *Circuit Judges*, and OBERDORFER,* *District Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *District Judge* OBERDORFER.

WRIGHT, *Circuit Judge*: In this case we review a decision of the District Court that the Secretary of Commerce must, under the Pelly and Packwood-Magnuson Amendments, *see* 22 U.S.C. § 1978 (1982); 16 U.S.C. § 1821(e)(2) (1982), certify Japan as "diminish[ing] the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), *entered into force* November 10, 1948, 62 STAT. 1716, T.I.A.S. 1849, *reproduced* in Joint Appendix (JA) at 47-57, because Japanese nationals are undisputedly harvesting whales in excess of the harvest quotas promulgated under that Convention.

We agree with the District Court's ultimate conclusion that certification in this case is mandatory, though we reach it for slightly different reasons. Thus we hold that, although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas. Consequently, we affirm the judgment of the District Court.

I. Background

A. *The International Convention for the Regulation of Whaling*

The ICRW was formed in 1946 to regulate whaling by "establish[ing] a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks." Preamble, JA 48. Toward this end, a Schedule of specific requirements and prohibitions regarding whaling practices was promulgated; this Schedule was adopted as part of the Convention. *See* Article I, JA 48; Schedule, JA 52-56.

In addition, the signatory nations agreed to establish an International Whaling Commission (IWC). *See* Article III, JA 48. The ICRW authorized the IWC to study whales, whale stocks, and whaling practices. *See* Article IV, JA 49. The IWC was also authorized to amend the ICRW Schedule

> by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.

Article V, JA 49-50.

With respect to such amendments, the ICRW provided for an objection procedure. Under this procedure, any of the member nations may file an objection to a Schedule

amendment within 90 days of being notified of the amendment. If such an objection is filed in a timely manner, the objecting nation is not bound by the amendment (although the non-objecting nations are bound). Once an objection is withdrawn, however, it cannot be refiled. *See* Article V, JA 50.

B. *U.S. Enforcement Legislation*

Under the ICRW, the IWC itself has no enforcement powers against nonmembers or against members who, by objecting, choose not to be bound by a given IWC determination. This lack of enforcement ability is typical of international fishery and wildlife conservation programs. To provide enforcement leverage for this and other such programs, Congress in 1971 enacted the Pelly Amendment. *See* 22 U.S.C. § 1978. Although this Amendment focused on the depletion of North Atlantic salmon stocks by Denmark in excess of the quotas for fishing those stocks set under the International Convention for the Northwest Atlantic Fisheries (ICNAF), it clearly covered whaling as well. *See* H.R. Rep. No. 92-468, 92d Cong., 1st Sess. 4-6 (1971) (hereinafter Pelly House Report); 117 Cong. Rec. 34752 (1971) (statement of Rep. Pelly).

The Pelly Amendment provides that "[w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President." 22 U.S.C. § 1978(a)(1). The term "international fishery conservation program" is defined as "any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." Id. § 1978(h)(3). The phrase "diminish the effectiveness" is not defined in the statute.

The legislative history of this statutory provision clearly indicates that it authorizes certification of activities of nonmembers or members acting under a valid objection to an IWC Schedule amendment. *See* Pelly House Report at 5, 8-10 (explaining that Denmark, although it had objected to an ICNAF ban and was thus "free to ignore the ban" under the convention, would be covered under the Pelly Amendment).[1] The Amendment further provides that

> [u]pon receipt of any certification made under [22 U.S.C. § 1978(a)(1)], the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products * * * from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

22 U.S.C. § 1978(a)(4). Thus the President is authorized to place a foreign country in the position of having all its fish product exports to the United States prohibited for as long as the President deems necessary if the country's nationals "diminish the effectiveness" of an international fishery conservation program—whether or not the fishing is legal under the terms of the Convention by virtue of the foreign country having objected to the relevant provision or being a nonmember nation.[2]

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[1] Intervenor-appellants Japan Fisheries Association and Japan Whaling Association argue that certification and the imposition of sanctions pursuant to such certification are violations of international law when applied to a validly objecting member insofar as the Convention requirements are not effective with respect to such a member. We disagree. There is no prohibition in the Convention against member nations acting unilaterally to force an objecting member (or nonmember) to comply with the Convention's regulations, even where those regulations are not binding on the member (or nonmember) under the terms of the Convention itself.

[2] The idea behind this provision was that a foreign country in this position will choose the less damaging economic alter-

In addition, the President is required to notify Congress of any actons taken pursuant to certification within 60 days of that certification; if the President does not impose the sanctions authorized, he must also give reasons to Congress for his failure to do so. *See* 22 U.S.C. § 1978(b).[3]

After passage of the Pelly Amendment, several certifications occurred, although no sanctions were ever imposed by the President against the offending countries. Instead, the certifications were used to extract conservation agreements from the offending nations. Further, the

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native, which will usually be giving up the proscribed fishing rather than the U.S. fish products export market. As the House reported noted,

> In the case of Atlantic Salmon, Danish exports to the United States totalled 54,365 pounds in 1970 worth $63,844.00. Imports of all Danish fish products totalled 31,656,00 lbs. valued at $10,543,298. The impact of lossing [*sic*] a 10 million dollar market as opposed to a 63 thousand dollar market is obvious.

House Pelly Report at 7.

[3] In 1978, in response to the signing of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), *opened for signature* March 3, 1973, [1976] 27 U.S.T. 1087, T.I.A.S. No. 8249, Congress amended the Pelly Amendment by adding a new certification section:

> When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

22 U.S.C. § 1978(a)(2). Further, § 1978(a)(4) was amended to authorize the President to "prohibit the bringing or the importation into the United States of * * * wildlife products * * * from the offending country" in the case of such certification. The congressional notification provisions also were applied to these situations. *See* 22 U.S.C. § 1978(b).

certifications that were made were not accomplished in a notably expeditious fashion. *See, e.g.*, 125 Cong. Rec. 22084 (1979) (statement of Rep. Oberstar). In response to the non-imposition of the Pelly Amendment's discretionary sanctions and to the perceived dilatory certification decisionmaking on the part of the Secretary of Commerce, Congress in 1979 passed the Packwood-Magnuson Amendment. *See* 16 U.S.C. § 1821(e)(2).

The Packwood-Magnuson Amendment provides that if the Secretary of Commerce certifies that a country is diminishing the effectiveness of the IRCW (this provision applies only to the ICRW), the Secretary of State *must* impose a sanction against the offending country.[4]

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[4] The Packwood-Magnuson Amendment provisions regarding imposition of the sanction are:

> (B) If the Secretary issues a certification with respect to any foreign country, then each [U.S. fishing allocation] that—
>
> (i) is in effect for that foreign country on the date of issuance; or
>
> (ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period [the one year following certification];
>
> shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.
>
> (C) The following apply for purposes of administering subparagraph (B) with respect to any foreign country:
>
> (i) If on the date of certification, the foreign country has harvested a portion, but not all, of the quantity of fish specified under any allocation, the reduction under subparagraph (B) for that allocation shall be applied with respect to the quantity not harvested as of such date.
>
> (ii) If the Secretary notified the Secretary of State that it is not likely that the certification of the foreign country will be terminated under section 1978(d) of title 22 before the close of the period for

The sanction is an immediate reduction, by not less than 50 percent, of any allocation for fishing in United States territorial waters that is in effect for that country on the date of certification or that would otherwise be made within the year following certification. 16 U.S.C. § 1821 (e) (2) (B).[5] If the certification is terminated within

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> which an allocation is applicable or before the close of the remedial period (whichever close first occurs) the Secretary of State, in consultation with the Secretary, shall reallocate any portion of any reduction made under subparagraph (B) among one or more foreign countries for which no certification is in effect.
>
> (iii) If the certification is terminated under such section 1978(d) of title 22 during the remedial period, the Secretary of State shall return to the foreign country that portion of any allocation reduced under subparagraph (B) that was not reallocated under clause (ii); unless the harvesting of the fish covered by the allocation is otherwise prohibited under this chapter.
>
> (iv) The Secretary may refund or credit, by reason of reduction of any allocation under this paragraph, any fee paid [by the foreign country for its fishing permits].
>
> (D) If the certification of a foreign country is not terminated under section 1978(d) of title 22 before the close of the last day of the remedial period, the Secretary of State—
>
> (i) with respect to any allocation made to that country and in effect (as reduced under subparagraph (B)) on such last day, shall rescind, effective on and after the day such last day, any unharvested portion of such allocation; and
>
> (ii) may not thereafter make any allocation to that country * * * until the certification is terminated.

16 U.S.C. § 1821(e) (2).

[5] As originally introduced, the bill would have applied to all countries certified under the Pelly Amendment with re-

one year by virtue of a determination by the Secretary of Commerce that the justification for the certification has ceased, the prior allocation must be reinstated. Otherwise, the reduced allocation remains in effect until such time as the certification is terminated. The Packwood-Magnuson Amendment, therefore, did not alter the Pelly Amendment's provision regarding certification of foreign countries; it simply provided for a mandatory sanction where certification occurs in the whaling context.[6]

The Packwood-Magnuson Amendment also included two provisions amending the Pelly Amendment. The first one requires prompt action by the Secretary with respect to certification decisions. This provision states that

> the Secretary of Commerce * * * shall—
>
> (A) periodically monitor the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) and (2);

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spect to "living marine resources" and would have required 100% prohibition of U.S. fishing allocations. *See* S. Rep. No. 96-72, 96th Cong., 1st Sess. 6 (1979). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Packwood); *id.* at 22082-22083 (statement of Rep. Murphy). (Under the final bill, a 50% reduction is required; a greater reduction is possible at the discretion of the Secretary of State.) The original bill, however, would have cut the allocation only as of the expiration of the country's current fishing permit. *See id.* at 22083 (statement of Rep. Murphy).

[6] It also explicitly preserved the option of imposing the Pelly Amendment sanction in addition to the Packwood-Magnuson sanction. *See* 16 U.S.C. § 1821(e)(2)(A)(i). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Magnuson) "This amendment is a significant addition to the sanctions presently available under the Pelly Amendment * * *."); *id.* at 22084 (statement of Rep. Oberstar) ("The legislation before us does not deprive the President of the authority to invoke the discretionary penalty; it adds an additional penalty that is automatic.").

> (B) promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraphs (1) or (2); and
>
> (C) promptly conclude; and reach a decision with respect to; any investigation commenced under subparagraph (B).

22 U.S.C. § 1978(a)(3). The second amending provision provides for periodic review by the Secretary of the validity of his certification decision and for its termination when it is no longer necessary. *See id.* § 1978(d). The overall thrust of the Packwood-Magnuson Amendment, therefore, was to narrow Executive Branch discretion allowed by the Pelly Amendment.

C. *History of This Dispute*

In 1981 the IWC voted to provide a zero quota for North Pacific sperm whales. Specifically, the IWC members agreed that no sperm whales could be taken unless the IWC established a specific quota for a given year. Japan filed a timely objection to this quota. In 1982 Japan succeeded in obtaining an IWC revision of this zero quota for the following two harvest seasons (and for those seasons only). Also in 1982, however, the IWC voted to implement a five-year moratorium on all whaling beginning in 1986. The purpose of this moratorium was to allow regeneration of depleted whale populations and to afford scientists an opportunity to gather additional information on the vitality and security of whale populations. The decision provides for automatic reconsideration of the moratorium in 1990. Japan, the Soviet Union, and Norway filed timely objections to the moratorium.

Pursuant to Japan's formal objection to the sperm whale quota, Japanese whalers have continued to harvest whales in excess of the IWC (zero quota) limits. *See American Cetacean Society v. Baldridge* [*sic*], 604

F.Supp. 1398, 1404, 1409 (D. D.C. 1985). In response to these activities Greenpeace and other conservation organizations filed this suit on November 8, 1984, requesting that the District Court order the Secretary of Commerce to certify Japan under the Pelly and Packwood-Magnuson Amendments. They contended that such certification is mandatory and nondiscretionary where harvesting that is clearly in excess of the IWC quotas occurs under the auspices of a foreign government.

Also in November 1984 the Secretary of State and the Secretary of Commerce entered into negotiations with Japan regarding its whaling activities. On November 13, 1984 an executive agreement was reached in an exchange of letters between the United States and Japan. *See* JA 78-84. In these letters the United States agreed not to certify Japan under the Pelly and Packwood-Magnuson Amendments in exchange for Japan's agreement to cease all whaling in 1988 (two years after the moratorium goes into effect) and to take no more than 400 sperm whales in each of the 1984 and 1985 seasons, no more than 200 sperm whales in each of the 1986 and 1987 seasons, and an "acceptable" number of Bryde's and minke whales in the 1986 and 1987 seasons. *See* JA 81-82. This agreement, therefore, allows continued Japanese violation of the quotas until 1988 with no imposition of sanctions by the United States. Japan in turn agreed to withdraw its IWC objections: to the sperm whale quota by December 13, 1984, to become effective in 1988 (which it did, *see* JA 106), and to the moratorium by April 1, 1985, also to become effective in 1988.

On March 5, 1985, however, Judge Richey issued an order and opinion granting the plaintiffs the relief they requested and ordering the Secretary of Commerce to certify Japan. *See* 604 F.Supp. at 1411. The government immediately appealed to this court, which granted a stay

of the order pending appeal.[7] In response to the District Court's decision, Japan has indicated that it would not withdraw its general objection to the moratorium on April 1, 1985, as agreed. It has also indicated, however, that it would withdraw that objection within five days of a decision by this court reversing the District Court. *See* brief for federal appellants at 9-10.

II. Legal Principles and Standard of Review

The District Court determined that there were no genuine issues of material fact and that the plaintiffs were entitled to judgment as a matter of law. *See* 604 F.Supp. at 1404-1408.[8] The District Court further concluded that issuance of a writ of mandamus was appropriate in the circumstances of this case. *See id.* at 1410-1411.[9]

The government does not contend on this appeal that a genuine issue of material fact exists. Rather, it argues that the District Court's view of the law was erroneous and that issuance of the writ of mandamus was unsupported by the substantive statute. Specifically, the government interprets the statute as affording it broad discretion in deciding whether to certify Japan in the circumstances of this case. And the government contends that

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[7] The District Court had previously denied such a stay. *See American Cetacean Society v. Baldridge*, 604 F.Supp. 1411 (1985).

[8] *See* Fed. R. Civ. P. 56(c) ("[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").

[9] *See* 28 U.S.C. § 1361 (1982) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

its interpretation of the statutory language is entitled to deference because Congress did not address the specific question at issue here and thus implicitly delegated the task of filling the statutory gap to those charged with implementing the statute (here the Secretary of Commerce). The government further argues that because (according to its interpretation of the statute) it has discretion with respect to the action sought by the plaintiffs the remedy of mandamus is precluded. The government goes on to argue that it exercised its discretion in a reasonable manner and that its decision must therefore be upheld. These arguments make clear that we review here a purely legal determination on the part of the District Court. Consequently, we perform that review *de novo*.

A. *Interpretation of the Statute*

The fundamental question here is one of statutory interpretation. As this court has noted previously, our first task in approaching such a question is to determine whether Congress had an intent with respect to the relevant issue. " 'If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' " *American Methyl Corp. v. EPA*, 749 F.2d 826, 833-834 (D.C. Cir. 1984) (*quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, —— n.9, 104 S.Ct. 2778, 2782 n.9 (1984)). *See also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, —— U.S. ——, ——, 105 S.Ct. 1102, 1108 (1985). In this step, "we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984). *See also State of Montana v. Clark*, 749 F.2d 740, 745 (D.C. Cir. 1984).

If we determine that Congress had no intent regarding the issue in question, then we must consider whether

Congress delegated to the agency the task of filling the statutory gaps or of interpreting statutory ambiguities. If Congress has explicitly delegated to the agency the responsibility of "explicat[ing] the ambiguous language or fill[ing] the statutory void," *State of Montana, supra*, 749 F.2d at 745, then we must "affirm the agency's construction unless [it is] arbitrary, capricious, or manifestly contrary to law." *Id. See also* 5 U.S.C. § 706(2)(A) (1982). If Congress has implicitly delegated that responsibility to the agency, "*Chevron* commands that the court affirm an agency's interpretation of a statute it is entrusted to administer provided that it is 'reasonable.'" *State of Montana, supra*, 749 F.2d at 745. Thus, where Congress has delegated—explicitly or implicitly—certain interpretive power to the agency, we will defer to the agency's interpretation if it falls within the boundaries of that delegation. We emphasize again, however, that this analysis is proper only if Congress itself had no intent regarding the question at issue.

B. *Propriety of Mandamus*

It is well established that mandamus is proper only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of and for the Blind of Delaware County Valley v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (*en banc*). Mandamus will issue "'only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'" *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (*quoting United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)).[10]

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[10] Even where mandamus is legally appropriate, a District Court may exercise its equitable discretion and deny the writ if issuance is inappropriate for other reasons. *See, e.g., 13th*

As this court has noted previously, however, "[t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt. * * * As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie." *13th Regional Corp., supra*, 654 F.2d at 760. The question, therefore, is one of congressional intent: "If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (*citing Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Broum*, 656 F.2d 564, 566 (10th Cir. 1981)). *See also Work v. Rives*, 267 U.S. 175, 177 (1925).

Our approach in addressing a request for a writ of mandamus is thus entirely consistent with the statutory interpretation approach set forth in *Chevron, supra*: As with any statutory question, the first step is to determine the intent of Congress. If Congress had an intent with respect to the question at issue and if that intent was to create a mandatory, nondiscretionary duty on the part of the official(s) charged with administering the statute, then mandamus is appropriate (if no other remedy is adequate). Alternatively, even if Congress had an intent, if it did not intend to create a mandatory duty, mandamus is not appropriate. So too, if Congress had no particular intent but rather intended to delegate the interpretive function to the agency, mandamus is precluded.

Regional Corp., 654 F.2d 758, 760, 762-763 (D.C. Cir. 1980) (delay of four years in seeking writ reasonable basis for denying it). *See also Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975).

The demarcations between these classes of cases will not always be self-evident, however. For example, Congress may delegate some interpretive authority to an agency and yet simultaneously have a specific intent with respect to some situations that might normally be thought to fall within the boundaries of the delegated discretion. "In other words, even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated." *Davis Associates, Inc. v. Secretary, Dep't of HUD*, 498 F.2d 385, 389 n.5 (1st Cir. 1974). *See also Estate of Smith, supra*, 747 F.2d at 591; *Carpet Layers Local 419, supra*, 656 F.2d at 566; *Grasso v. Norton*, 520 F.2d 11, 26-27 (3d Cir. 1975); *De La Fuente v. Stokely-Van Camp, Inc.*, 514 F. Supp. 68, 82 (C.D. Ill. 1981); *Corrugated Container Corp. v. Community Services Administration*, 429 F. Supp. 142, 151-152 (W.D. Va. 1977). Consequently, we must be careful to ascertain as precisely as possible the exact contours of congressional intent and of congressional delegation. With this cautionary thought in mind, we proceed to the statutory interpretation issue presented in this case.

III. Discussion

The precise question in this case is whether the statutory requirement that the Secretary of Commerce certify a foreign country when he determines that nationals of the country are acting so as to diminish the effectiveness of the ICRW imposes on the Secretary a nondiscretionary duty to certify when he determines that the nationals of a foreign country are harvesting whales in excess of an IWC quota.

A. *Identification of the Governing Statutory Provision*

As noted above, there are two legislative enactments at the center of this controversy. In determining congres-

sional intent as to the key statutory phrase, it is necessary first to ascertain which statute containing that phrase is the relevant statute in the situation at hand. On this issue, the parties' positions are quite unclear. For example, all of the parties refer to the legislative history of both the Pelly and Packwood-Magnuson Amendments without indicating which statutory provision is the critical one.

Although it is clear that certification in this case would result in imposition of the Packwood-Magnuson sanction, we are concerned here with the statute governing the certification itself. The Pelly Amendment provides for investigation of suspected actions that might qualify for certification and for certification of actions that "diminish the effectiveness" of an international fishery conservation program. It then authorizes the President, at his discretion, to impose certain sanctions on the certified country. The Packwood-Magnuson Amendment, on the other hand, provides for mandatory imposition of other sanctions "[i]f the Secretary issues a certification with respect to any foreign country * * *." 16 U.S.C. § 1821(e)(2)(B). Such certification, for purposes of the Packwood-Magnuson Amendment, includes only a certification with respect to the ICRW. *Id.* § 1821(e)(2)(A)(i).

These provisions indicate that certification of a country for diminishing the effectiveness of the ICRW in fact occurs under the Pelly Amendment; only after certification occurs do the Packwood-Magnuson Amendment mandatory sanction provisions kick in. This interpretation is consistent with the legislative history of the Packwood-Magnuson Amendment, which indicates that the purpose of that Amendment was simply to create a new sanction for ICRW certifications—not to alter the certification process. *See* S. Rep. No. 96-72, 96th Cong., 1st Sess. 6 (1979); 125 Cong. Rec. 22082 (1979) (statement of Rep. Murphy).

One provision of the Packwood-Magnuson Amendment, however, seems at first reading to cast some doubt on this theory. That provision states: "A certification under [the Packwood-Magnuson Amendment] shall also be deemed a certification for the purposes of section 1978(a) of title 22 [the Pelly Amendment]." 16 U.S.C. § 1821(e)(2)(A)(i). Although this language could be interpreted to mean that an ICRW-related certification in fact occurs under the Packwood-Magnuson Amendment, we conclude that it is better read as meaning that a certification made under the Pelly Amendment but qualifying under the Packwood-Magnuson Amendment (that is, one relating to the ICRW) is also a certification for purposes of the discretionary Pelly Amendment sanctions authorized by 22 U.S.C. § 1978(b). *See* note 6 *supra*. That is, a country that is certified for ICRW-related actions is automatically sanctioned under Packwood-Magnuson and also may, at the President's discretion, be sanctioned under the Pelly Amendment itself. This interpretation is supported by the fact that the Packwood-Magnuson Amendment refers to the possibility of the Secretary terminating certification *under 22 U.S.C. § 1978(d)*. *See* 16 U.S.C. §§ 1821(e)(2)(C)(ii) & (D). Section 1978(d), however, applies specifically to termination of certifications made under the Pelly Amendment.[11]

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[11] 22 U.S.C. § 1978(d) provides:

> After making a certification to the President under subsection (a) of this section, the Secretary of Commerce or the Secretary of the Interior, as the case may be, shall periodically review the activities of the nationals of the offending country to determine if the reasons for which the certification was made no longer prevail. Upon determining that such reasons no longer prevail, the Secretary concerned shall terminate the certification and publish notice thereof, together with a statement of the facts on which such determination is based, in the Federal Register.

In sum, therefore, although the certification language appears in both the Pelly and the Packwood-Magnuson Amendments, we are concerned here with its meaning in the Pelly Amendment, for ICRW certifications are actually made under that Amendment. Thus we look first to the language and legislative history of the Pelly Amendment itself to determine congressional intent as to the meaning of this phrase. Legislative history subsequent to the Pelly Amendment is relevant only for the limited purpose of determining whether Congress later expressed a different intent, which would then govern this case.

B. *Interpretation of the Governing Statutory Provision*

The relevant statutory language provides:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

22 U.S.C. § 1978(a)(1). Under this provision there are two steps in the certification process. First, the Secretary must determine whether actions of foreign nationals are "diminish[ing] the effectiveness" of an international fishery conservation program. Second, if he so determines he shall certify that fact to the President. We will address each statutory step separately.

1. *Does whaling in violation of an IWC quota require that the Secretary conclude that the foreign nation is "diminishing the effectiveness" of the ICRW?*

a. *Statutory language.* The critical statutory phrase, "diminish the effectiveness," is not defined in the statute. The language, furthermore, does not indicate the boundaries of administrative discretion intended by Congress to apply. To ascertain congressional intent, therefore, we turn to the relevant legislative history.

b. *Legislative history of the Pelly Amendment.* The House and Senate committee reports and statements on the floor of the Congress give clear indications of congressional intent with respect to the critical language. Specifically, they indicate quite plainly that fishing in excess of internationally set quotas was considered an automatic trigger of certification.

The Senate Report, for example, states that the purpose of the Amendment was

> to amend the Fisherman's Protective Act * * * to prohibit the importation of fishery products from nations that do not conduct their fishing operations in a manner that is *consistent with international conservation programs.* It would accomplish this by providing that *whenever the Secretary of Commerce determines that a country's nationals are fishing in such a manner, he must certify such fact to the President.* * * *

S. Rep. No. 92-582, 92d Cong., 1st Sess. 2 (1971) (emphasis added).[12] This statement makes plain that fishing that is inconsistent with internationally set quotas mandates certification. Since, as noted above, member countries that filed valid objections were intended to be covered by this Amendment, *see* Pelly House Report at 5, 8-10, the failure to act "consistent with" an international program must include fishing by even such members in excess of convention quotas. Consequently, this statement

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[12] There are actually two Senate Reports, both issued the same day, that are relevant to the Pelly Amendment. The first, S. Rep. No. 92-582, accompanied S.2191. S.2191, however, was amended in committee to the exact language of H.R. 3304, the bill that the Senate eventually passed as the Pelly Amendment. The second, S. Rep. No. 92-583, 92d Cong., 1st Sess. (1971), accompanied H.R. 3304. S. Rep. 92-582 contains substantive discussion of S.2191. S. Rep. 92-583 merely reported H.R. 3304 without recommendation or amendment. Since both bills were the same with respect to the provisions that concern us, we regard S. Rep. 92-582 as the relevant report.

makes abundantly clear that exceeding internationally set quotas was intended to automatically trigger certification.

This unambiguous passage finds generous support from other statements in the committee reports and in the floor debates on the bill. In all of these statements, the determination that a country was "violating," acting "inconsistent with," or failing to "abide by" was equated with the fact of certification.

For instance, both the Senate and House reports note that the provision requiring that the President notify Congress whenever certification occurred would "insure that the Congress is made aware of the failure of any foreign country to abide by an international fishery conservation program." Pelly House Report at 8; S. Rep. No. 92-582 at 6. These statements obviously contemplate that notification (and thus the certification that triggers it) would automatically occur any time a foreign country exceeded internationally set regulations.

In addition, Senator Stevens, the acting chairman of the reporting Senate Committee, clearly envisioned that a violation would trigger the President's power to impose sanctions. Whether application of sanctions was discretionary is not the issue at this point; the issue is whether Congress intended that violations of fishing agreements would automatically trigger that sanction-imposing power. Senator Stevens emphasized:

> I believe it is important to note that such importation prohibition as permitted by the act is not limited to the particular fish product taken *in violation of a particular fish conservation program.* For example, although a given country, I use Denmark as an example, violates an international fisheries conservation program, such as the International Convention for the Northwest Atlantic Fisheries—ICNAF, the President may prohibit the importation of all fish products from the offending country, not

> only salmon. This is important, because it multiplies the effect of a violation manifold. * * *

117 Cong. Rec. 47053 (1971) (emphasis added).

Neither Senator Stevens nor any other congressional speaker ever remotely suggested that which the government argues here—that Congress intended that there be some intermediate exercise of discretion between (1) the violation of an international fishing agreement and (2) the presidential power to impose sanctions. Rather, the power to impose sanctions was viewed as an immediate incident to recognition of the violation. *See also id.* at 34750 (statement of Rep. Dingell) ("the purpose of [the bill] * * * is to authorize the President of the United States to prohibit the importation into this country of fishery products from nations that do not conduct their fishing operations in a manner that is consistent with international fishery conservation programs").[13]

Indeed, the Executive Branch itself indicated this understanding that the power to impose sanctions was an automatic consequence of a fishing agreement violation. For example, the Commerce Department stated that "the existence of [the ICNAF ban on high seas fishing for Atlantic salmon] would * * * authorize the President to impose sanctions against countries which do not abide by that ban * * *." Pelly House Report at 10. Again, there was no hint of some intermediate exercise of discretion, as the government now contends. Thus the direct legislative history of the Pelly Amendment clearly indi-

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[13] Representative Pelly stated that the provision would extend to "flagrant violations" other than salmon fishing and that the provision would prevent American benefits (access to the American import market) from accruing to foreign countries that "flount [*sic*] international conservation measures." *See* 117 Cong. Rec. 34752 (1971). These statements do indicate that flagrant actions in excess of internationally set regulations would result in certification, but do not indicate that non-flagrant actions would not. Consequently, they are not directly relevant to the issue at hand.

cates that Congress intended that fishing in excess of internationally set conservation regulations constitute *per se* actions diminishing the effectiveness of an international program.

c. *Congressional use of the key phrase in a similar context.* As this court has noted, "[A]bsent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning, since there is hardly a basis for assuming that the lawmakers had anything else in mind." *United Shoe Workers of America v. Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974) (footnotes omitted). This admonition is important in this case because the crucial language was used by Congress in an earlier act dealing with a similar situation. In that context, Congress' intent was clearly that quota violations *per se* diminished the effectiveness of the international program.

In the attachments to the House Report on the Pelly Amendment are comments on the proposed Amendment from various Executive agencies. Among these is a letter from the Secretary of Commerce in which the Secretary observes, without elaboration, that the scheme set up by the Pelly Amendment is similar in language and approach to that used in the Tuna Convention Act of 1950 (as amended). 16 U.S.C. § 951 *et seq.* (1982). *See* Pelly House Report at 13.

Looking to the Tuna Act, we note that, in a provision added in 1962, Congress required the Secretary of Commerce to promulgate regulations prohibiting the importation of tuna while international tuna conservation recommendatons were in force whenever fishing was being conducted "in such manner or in such circumstances as would tend to diminish the effectiveness" of the international recommendations. *See* 16 U.S.C. § 955(c).[14]

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[14] 16 U.S.C. § 955(c) provides in relevant part:

> [U]pon the promulgation of any [domestic regulations implementing the recommendations of the Inter-American

The legislative history of the 1962 amendments, which added the relevant provisions to the Tuna Act, details what was meant by this language. In the Senate Report accompanying those amendments, the Commerce Committee incorporated into the body of the report a statement by the Secretary of the Interior as to the intended interpretation of this language.[15] The statement was incorporated into the report so as to make perfectly clear what the language meant: "Because the committee regards these provisions as being of key importance, it is including the [Department of Interior's] statement * * * in the report so that the intended operation of the provisions may be clear." S. Rep. No. 1737, 87th Cong., 2d Sess. 6 (1962). The Secretary of the Interior, in turn, stated that the restrictions would apply

> when any of the following conditions obtains in the country from which [the tuna] is offered for entry:

> Tropical Tuna Commission] the Secretary of Commerce shall promulgate additional regulations, with the concurrence of the Secretary of State, which shall become effective simultaneously with the application of the [domestic regulations] (1) to prohibit the entry into the United States, from any country when the vessels of such country are being used in the conduct of fishing operations in the regulatory area in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the commission, of fish in any form of those species which are subject to regulation pursuant to a recommendation of the commission and which were taken from the regulatory area; and (2) to prohibit entry into the United States, from any country, of fish in any form of those species which are subject to regulation pursuant to a recommendation of the commission and which were taken from the regulatory area by vessels other than those of such country in such manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations of the commission. * * *

[15] The original bill evidently endowed the Secretary of the Interior rather than the Secretary of Commerce with the responsibility for executing this statutory provision.

> 1. The country does not provide or arrange for the timely provision of pertinent statistics to the Commission.
>
> 2. *The country does not put into effect conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations.*
>
> 3. The country, having put conservation measures into effect, does not take reasonable enforcement action.
>
> 4. The country does not take measures which will enable it to control the landing in its ports and subsequent export of tuna taught in the regulatory area by nationals of third parties.

Id. at 7 (emphasis added).

This statement makes clear that the 1962 tuna amendments were intended to require Executive action in a variety of situations—one of which was the situation in which a foreign country failed to implement the international body's harvest recommendations. With respect to this situation, no discretion on the part of the Secretary was intended: If a foreign country failed to implement the harvest recommendations, that failure would automatically result imposition of the statutory sanctions on the foreign country.[16] Given the similarities between the tuna amendments and the Pelly Amendment, the clear congressional intent with respect to the tuna amendments confirms our conclusion that Congress, in enacting the Pelly Amendment, intended that fishing (or whaling) in excess of internationally set quotas would

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[16] We find no evidence of an interpretation of the 1962 amendments contrary to that expressed in their legislative history. No cases interpreting that statutory section were apparently decided. The Secretary did promulgate implementing regulations, *see, e.g.*, 50 C.F.R. § 281.5 (1984), but those regulations were consistent with the statement in the Senate Report.

per se "diminish the effectiveness" of the international fishery conservation program.[17]

This is not to say that Congress intended that the Secretary have no discretion whatever in making deter-

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[17] The 1962 amendments also provided:

> In the case of *repeated and flagrant fishing operations* in the regulatory area by the vessels of any country which *seriously threaten the achievement of the objectives of the commission's recommendations*, the Secretary of Commerce, with the concurrence of the Secretary of State, may, in his discretion, also prohibit the entry from such country of such other species of tuna, in any form, as may be under investigation by the commission and which were taken in the regulatory area. * * *

16 U.S.C. § 955(c) (emphasis added). Thus these amendments created a bipartite scheme for enforcing the tuna treaties. First, failure to implement or enforce the treaty recommendations would result in prohibition of imports of a particular tuna species from the offending country. Second, particularly serious violations of the treaty recommendations might, at the discretion of the Secretary of Commerce, result in prohibition of importation of all protected tuna species taken from the regulated area.

Given this bipartite scheme, the use of the "diminish the effectiveness" language in the Pelly Amendment seriously undermines two additional arguments made by the appellants. First, the "diminish the effectiveness" provision clearly did not apply only to flagrant "violations." *See* brief of Japanese appellants at 19-20. Another provision, with a greater potential sanction, was of such limited applicability. Thus such seriousness was not necessary for actions to qualify as "tending to diminish the effectiveness" of the Commission's recommendations.

Second, the "diminish the effectiveness" provision cited the commission's recommendations themselves, as opposed to the more serious provision of the 1962 amendments, which referred to achievement of the objectives of those recommendations. Thus the "diminish the effectiveness" provision centered on enforcement of the recommendations. The latter provision, on the other hand, was aimed at larger activities with potential for undermining the entire international program and its objectives. *Compare* brief for federal appellants at 27-28

minations as to what actions "diminish the effectiveness" of international programs. Indeed, we think such an extreme interpretation very unlikely. The Secretary may well, for example, have discretion in determining whether actions inconsistent with nonbinding international resolutions, *see Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 317 (1979) (hereinafter *Hearings*), JA 213, or actions that undermine achievement of binding regulations but that do not actually violate them "diminish the effectiveness" of those programs. In fact, it seems that, given the legislative history of the 1962 tuna amendments, the language may well have been chosen to allow certification in a variety of situations—some nondiscretionary and some discretionary. We decide simply that the specific type of situation here—clear violation of an internationally set fishing quota—was intended by Congress to trigger automatically the "diminish the effectiveness" determination and that no discretion as to whether to make this determination in this situation was given to the Secretary.

d. *Subsequent legislative history.* Although it is congressional intent relating to the Pelly Amendment that is important to us here, it is possible that subsequent legislative history could affect our conclusion as to congressional intent regarding the key statutory phrase. If Congress, at a later point, either ratified a different administrative construction or otherwise specifically indicated an intent contrary to its intent at the time the amendment was enacted, then those later statements of congressional intent may supersede the intent as originally expressed. On the other hand, if congressional statements and actions suggest an understanding con-

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(focusing on overall program objectives in Pelly Amendment context). In the 1962 tuna amendments, therefore, fishing in excess of the international body's recommendations was understood to be *per se* an action "tending to diminish the effectiveness" of those recommendations.

sistent with the initial intent, they will reinforce the weight to be given that intent.

The government makes two arguments relevant to the question of later congressional intent. First, it argues that the administrative practice under the Pelly and Packwood-Magnuson Amendments has consistently been that the Secretary determines that "intentional whaling or fishing activities in excess of duly established international quotas" "diminish the effectiveness" of those quotas only "in the absence of any mitigating factors which shift the balance." Brief for federal appellants at 20. Second, it argues that Congress, in the 1978 "wildlife products" amendments to the Pelly Amendment,[18] recognized significant discretion on the part of the Secretary in determining when actions "diminish the effectiveness" of the international programs. Far from supporting the government's position, however, the subsequent legislative history supports the interpretation that the Secretary has a nondiscretionary duty to certify when another country exceeds international fishing limits.

To begin with, even assuming that the government's characterization of past Executive practice is accurate (an assumption whose validity we need not resolve and that we therefore do not address[19]), we see no indications that Congress was either aware of or acquiesced in such a practice. In fact, the legislative history of the Packwood-Magnuson Amendment indicates an understanding of the certification process in the context of international whaling in excess of IWC quotas that consistently supports the conclusion we reached previously

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[18] *See* note 3 *supra*.

[19] We note simply that the parties' characterizations of this practice differ and that the record does not conclusively show what that practice has been. Any disagreement on this point does not present a genuine issue of material fact because, as we conclude, even if the government could show a consistent practice supporting its interpretation, there are no indications that it was acknowledged, let alone accepted, by Congress.

as to congressional intent with respect to the relevant provision of the Pelly Amendment.

The Packwood-Magnuson Amendment as it was finally enacted was added to the bill that eventually became law only after the bill had gone through the committee process. *See* H.R. Rep. No. 96-170, 96th Cong., 1st Sess. (1979) (amendment not included); S. Rep. No. 96-72, 96th Cong., Sess. 6 (1979) (amendment included in original form of (1) applying to all Pelly Amendment certification and (2) 100 percent reduction of fishery allocation in case of such certification). In such a situation, where voting Senators and Representatives do not have pertinent committee reports to inform their understanding of a proposed statute, the statements of the bill's sponsors on the floor of the Congress will be of unusually great significance in determining congressional intent, for the representations made by the sponsors will likely be relied upon by the Congress.

The statements made by the sponsors of the Packwood-Magnuson Amendment strongly support the conclusion that intentional whaling in excess of the IWC quotas was intended to trigger certification automatically. On the floor of the Senate, Senator Packwood summarized the projected operation of the proposed amendment:

> The core of the Packwood-Magnuson amendment is simply that any foreign nation which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.
>
> * * * *
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> * * * This amendment * * * will prohibit those nations which violate the conservation regulations of the International Whaling Commission from fishing within our 200-mile zone. As Senator Magnuson and I had initially drafted it, it would have prohibited them from totally fishing in the zone if they

violated the conservation regulations, but it would not have prohibited it until their permit to fish within the zone had to be renewed, and that would be up to a year.

Consequently, in working with the House managers we have reached a compromise which says that if any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately, not having to wait until their permit can be renewed, lose 50 percent of their allocation for fishing within our 200-mile zone. If between that time and the time of the renewal of the permit they have not brought themselves in compliance with the regulations of the International Whaling Commission they will totally lose the right to fish in our 200-mile zone.

The reason that this amendment will be so effective is because it is going to force Japan and Russia, which are the two principal violators of the International Whaling Commission regulations, to choose between the continued taking and/or buying of illegal whale meat, to choose between that privilege and the privilege of fishing in our 200-mile zone. The privilege of fishing in our 200-mile zone is an infinitely superior economic privilege and any country in its right mind when forced to the decision between fishing in the 200-mile zone and giving up illegal whaling is going to give up illegal whaling. This amendment would have the effect of forcing that decision, and it is probably the most significant step this country can take toward protecting the remaining whales of the world.

125 Cong. Rec. 21742-21743 (1979).

Another statement, made by Senator Magnuson, is similar:

If a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations or for engaging in trade that diminishes the effectiveness of the international regime regulating the taking of

> whales, then that nation will be denied access to fish in our 200-mile fishery conservation zone. This amendment is a significant addition to the sanctions presently available under the Pelly Amendment (22 U.S.C. 1978).
>
> There are several things that should be pointed out in this regard. First, the Japanese Government recently prohibited the importation of whale products from non-International Whaling Commission member nations. This action of the Japanese should be sincerely commended—it is a significant step forward. However, this does not mean that the Japanese traders should become complacent now or misread the intent of this amendment. If Japan or any other nation imports whale products from IWC member countries and this trade is merely a routing mechanism for whales taken outside international regulation * * * or otherwise diminishes the effectiveness of whale programs described earlier, then this amendment will still be invoked.

Id. at 21743. This statement supports the interpretation we suggested above: Certification results from violations of regulations *or* from other actions which "diminish the effectiveness" of the regulations.

On the floor of the House, Representative Murphy, the chairman of the committee responsible for the bill, noted that "with respect to any nation which the Secretary of Commerce has certified as being in violation of the IWC, the Secretary of State is required to immediately reduce the unharvested portion of any allocation to such nation by not less than 50 percent." *Id.* at 22082-22083. Representative Oberstar, a committee member who had been active in passage of the Amendment, further stated that "[t]he Department of Commerce certifies a nation under the provisions of [the Pelly] amendment when a nation is found to have acted in a manner contrary to international agreements for the protection of a fishery resource." *Id.* at 22083. These

statements clearly do not support a hypothesis that Congress contemplated an administrative practice of discretionary determinations that actions were "diminishing the effectiveness" of international regulations in the face of intentional exceeding of fishing/whaling quotas or that Congress endorsed such a practice in any way.[20] In fact,

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[20] There are statements by one Congressman that the government cites in support of its argument that discretion in the "diminishing the effectiveness" determination was intended. *See* 125 Cong. Rec. 22083 (1979) (statement of Rep. Breaux) ("I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disasterous [*sic*] effects on our U.S. fishing industry."); *Hearings* at 314-315, JA 210-211 (statement of Rep. Breaux) ("I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration. First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification[,] and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement."); *id.* at 317, JA 213 (statement of Rep. Breaux) ("The Secretary has the discretion in making a certification decision.").

We are not persuaded that these isolated statements by one Congressman rebut the numerous statements of others to the opposite effect. Further, we note that the one statement on the floor of the House is ambiguous; it could mean simply that the Secretary should be sure of his facts before certifying a violation. We also note that the same Congressman made contrary statements at the same Hearings as those cited by the government. *See Hearings* at 312, JA 208 (statement of Rep. Breaux) ("The [Packwood] amendment would require the Secretary of Commerce to deny fishing permits to nationals of those foreign nations which were found to be in contravention of an international conservation agreement, to which the United States was a party."); *id.* at 323, JA 204

they plainly support our conclusion that Congress intended that treaty violations automatically trigger such a determination.

The government also argues that Congress, in 1978, defined the phrase "diminish the effectiveness" in a manner that supports the government's contention that it is allowed discretion in making such determinations. In the House Report to these amendments, which extended the Pelly Amendment to apply to "trade or taking which diminishes the effectiveness of any international program for endangered or threatend species," 22 U.S.C. § 1978(a)(2),[21] the Committee stated:

> Paragraph (1) of section 2 would amend [22 U.S.C. § 1978(a)] to add a new paragraph (2) to such subsection to authorize the President to embargo wildlife products whenever the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of an international program for endangered or threatened species and the Secretary making such finding certifies such fact to the President. This paragraph makes it clear that the Secretaries' duties are mandatory, once an affirmative finding has been made. When the appropriate Secretary makes such a funding [*sic*], he must certify that fact to the President.
>
> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness

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(statement of Rep. Breaux) ("[A]ctually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing.").

[21] *See* note 3 *supra*.

> of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.

H.R. Rep. 95-1029, 95th Cong., 2d Sess. 15 (1978).

The government contends that this language indicates that Congress intended to give the Secretary discretion to determine that a country that is making "good faith efforts to bring itself into line with major conservation decisions" is not "diminishing the effectiveness" of those decisions. Brief for federal appellants at 14. We do not agree.

In assessing the relevance of this discription, it is crucial to remember that it applies only to the addition to the Pelly Amendment that addresses international programs for conservation of endangered and threatened species—not to the original fishery-related provision. Although this point may initially appear to be overly formalistic, we are convinced that a closer analysis shows it to be quite important.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), *opened for signature* March 2, 1973, [1976] 27 U.S.T. 1087, the international program that the 1978 amendments sought to enforce, *see* H.R. Rep. No. 95-1029, *supra*, at 11, operates in a manner entirely different from that of original Pelly Amendment. The fishery programs generally provide for concrete recommendations or actual quotas designating permissible and impermissible fishing (or whaling). CITES, on the other hand, provides for no such generally applicable regulations.

Rather, CITES is aimed at trade between nations. Substantively, it requires only import and export permits for trade in living specimens of species covered by the Convention or in products derived from dead specimens (*e.g.*, furs). The standard that member nations are pledged to honor in granting such permits is that the trade not be "detrimental to the survival" of the species

in question. Further, the determination is made by each country regarding the issuance or denial of a permit. *See* Articles III & IV, 27 U.S.T. at 1093-1097. No generally applicable trade or taking quotas are set under CITES. Thus CITES by its very nature allows for significant discretion on the part of the member nations that must implement it. *See, e.g., Defenders of Wildlife v. Endangered Species Scientific Authority*, 725 F.2d 726 (D.C. Cir. 1984) (addressing U.S. regulations for making determination with respect to bobcat exports). In light of this fact, the import of the House Report language becomes clearer: In the CITES context, the Secretary will almost always have to have discretion in making the relevant determination because there are essentially no nondiscretionary standards created under its auspices.[22]

In the fishery programs covered by the original Pelly Amendment (including the ICRW), however, there are many standards set that apply to all members: Discretion is vested in the international body rather than in the member nations. In these situations, of which the current case is one, discretion in making certification decisions is not necessary and appears, at least in this precise situation, not to have been intended by Congress. Consequently, we do not believe that this apparent expression of congressional intent with respect to the 1978 amendments rebuts the congressional intent regarding fishing and whaling in excess of internationally set quotas that was expressed in the legislative history of the 1971 and 1979 enactments. It simply confirms our initial conclusion that Congress intended that the Secretary exercise discretion in making *some* determinations (in contexts other than the one at hand).

In sum, we have considered the government's arguments that relate to subsequent congressional intent and we have concluded that Congress did not express an

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[22] The lone nondiscretionary standard is that there be the required permits. All other requirements necessitate exercise of discretion.

intent to change the meaning of the phrase "diminish the effectiveness" contained in the original Pelly Amendment in the type of context at issue in this case. Thus the conclusion we reached with respect to the original congressional intent regarding that phrase remains intact. To the extent that the subsequent legislative history is relevant, moreover, the evidence, particularly the statements of sponsors Packwood and Magnuson, fully supports our conclusion.

2. *Must certification result where the Secretary has made a determination that a foreign country is "diminishing the effectiveness" of an international fishery conservation program?* The next question we must address is whether, once the Secretary has determined that actions are "diminishing the effectiveness" of an international fishery conservation program, he must certify. The statute provides that when the Secretary determines that actions exist that diminish the effectiveness of a program he *shall* certify that fact to the President. The mandatory, nondiscretionary overtones of this word are conclusively corroborrated by the legislative history of this provision. Language such as the Secretary "must certify," S. Rep. No. 92-582, *supra*, at 2; 117 Cong. Rec. 47053 (1971) (statement of Sen. Stevens), "would be required to certify," *id.* at 34751 (statement of Rep. Dingell), and "[is directed] to certify," Pelly House Report at 6, supports the plain meaning interpretation of the statute that the duty to certify, once actions have been determined to "diminish the effectiveness" of an international program, is mandatory and nondiscretionary.

In sum, congressional intent with regard to the Pelly Amendment is as follows: Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifi-

cally, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

C. *Application of the Statute to the Instant Case*

The District Court found, and appellants do not controvert, that Japanese nationals have harvested sperm whales in excess of the harvest quotas set by the IWC (zero for the 1984-1985 season). *See American Cetacean Society, supra*, 604 F.Supp. at 1404, 1409. Based on this fishing, and on its interpretation of the statute as creating a nondiscretionary duty in the Secretary to certify where a nation allows whaling in excess of IWC quotas, the District Court issued the writ of mandamus requested by the plaintiffs. *See id.* at 1410-1411.

Based on our reading of congressional intent, we agree with the District Court that the Secretary had a nondiscretionary duty in these circumstances to certify Japan. So too do the plaintiffs have a clear right to relief. Finally, no other adequate remedy exists. Thus the legal requirements for issuance of the writ have been properly met.

Nor do we believe that the District Court abused its discretion in this instance. *The 13th Regional Corp., supra*, 654 F.2d at 760. The Japanese intervenor-appellants argue that the relief granted here, which in effect abrogates an agreement entered into by the Executive Branch with a foreign country, was an abuse of the District Court's equitable powers. *See* brief for Japanese appellants at 35-37. Although we are aware, as was the District Court, of the gravity of its order, we do not believe that it abused its discretion.

As we determined above, the executive agreement in question was entered into in violation of the Secrtary's statutory mandate. Although it is urged that deference to the Executive is particularly apt and intrusion by the judiciary particularly inapt in the foreign affairs context, it is imperative to remember that the Legislative Branch,

by explicit constitutional provision, has the power to regulate foreign commerce. *See* U.S. Const., Art. I, § 8. And, since the judiciary's role is to declare what the law is when Congress has acted, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), we must perform that duty even in this delicate context.[23]

IV. Conclusion

The District Court's decision granting summary judgment in favor of the plaintiff-appellees and ordering the Secretary of Commerce to certify Japan under 22 U.S.C. § 1978(a)(1) is affirmed. Because of the circumstances of this case, the mandate of this court is stayed for 90 days from the date of this opinion.

So ordered.

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[23] The Japanese appellants raise two additional arguments. First, they contend that the Secretary was required to promulgate rules regarding his interpretation of the governing statutory provision. Given that the issue here was one of congressional intent, however, whether or not the Secretary has promulgated interpretive rules is irrelevant. *See also SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Second, they contend that imposition of the Packwood-Magnuson sanction deprives them of a property right (the fishing allocation granted by 16 U.S.C. § 1821(e)(1)) without due process and without a hearing "on the record" provided by the Administrative Procedure Act. 5 U.S.C. § 556(d) (1982). These claims are also without merit. The organic statutes here provide no opportunity for a hearing at all, let alone a hearing on the record. Consequently, § 556(d) does not apply. *See, e.g., United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). Further, with respect to the due process claim, even assuming that applying the Packwood-Magnuson sanction would deprive these appellants of property rights, we conclude that, in the particular circumstances of this case, they have been afforded adequate due process: The underlying facts of the case are not at issue, *see American Cetacean Society v. Baldridge* [*sic*], 604 F.Supp. 1399, 1404, 1409 (D. D.C. 1985), and these appellants have participated in these proceedings, in which the legal issues have been fully briefed and argued.

OBERDORFER, *District Judge* (dissenting): With regret and respect I must dissent.

I cannot agree that, in the circumstances of this case, the Pelly Amendment, 22 U.S.C. § 1978, should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it. The Pelly Amendment, enacted in 1971, provides in pertinent part that

> [w]hen the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

22 U.S.C. § 1978(a)(1). The Packwood-Magnuson Amendment, which became law in 1979, requires the Secretary of State, upon receipt of a certification under the Pelly Amendment, to reduce by 50 percent the catch allowed the certified nation and its nationals in the waters within 200 miles of the coasts of the United States. 16 U.S.C. § 1821(e)(2). Brief reconsideration of the essential facts on which the Secretary relied in applying these statutes in this case will help explain my concerns.

I.

The International Convention for the Regulation of Whaling ("Convention") created an International Whaling Commission ("Commission") with authority to state, but not to enforce, limits or quotas for nations taking whales from the oceans of the world. In 1981, the Commission set what is in effect a zero catch limit for the Western Division Stock of North Pacific sperm whales. To do so, the Commission amended the Schedule which sets quotas or catch limits for various species of whales during defined seasons and in particular areas of the world. The Schedule now provides, among other things,

that "[n]o [sperm] whales may be taken from this stock until catch limits . . . are established by the Commission." Footnote 1 to Table 3, *reprinted in* Joint Appendix (J.A.) at 67.

Japan entered a timely objection to the 1981 Schedule. *See* Article V-3 of the Convention, *entered into force* Nov. 10, 1948, 62 Stat. 1716, T.I.A.S. 1849, *reprinted in* J.A. at 50; Table 3, 1983 Convention Schedule, J.A. at 67 n.*. By the terms of the Convention, this objection relieved Japan of any legal obligation to honor the 1981 quota. The Commission later agreed that Japan could take 450 sperm whales in the 1982 coastal season and 400 sperm whales in the 1983 coastal season. *See Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcommittee on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 19 (1982), *reprinted in* Appellee's Appendix at G-18. At its annual meeting in June 1984, the Commission declined to amend the Schedule as it applied to sperm whales. As a result, those nations which had not objected to the Schedule will be in violation of the Convention if they take sperm whales before the Commission establishes a new quota. J.A. at 77. Japan, however, did not withdraw its objection and therefore was not obligated under the Convention to observe the zero catch limit. *See* 1984 Amendments to the Schedule, J.A. at 77 n.*.

In 1982, the Commission purported to impose a moratorium on all commercial whaling, effective with the end of the 1985 coastal season and the end of the 1984/85 pelagic whaling season. J.A. at 65. Japan also objected to this moratorium and so is not legally obligated to observe it either. J.A. at 65 n.*. Japan nevertheless anticipated that, notwithstanding its objections and the absence of any obligation under international law to honor either the 1981 quota or the moratorium, it might be subject to certification and consequent sanctions by

the United States acting on the authority of the Pelly and Packwood-Magnuson Amendments. Accordingly, Japan commenced negotiations with American officials.[1] On November 13, 1984, Yasushi Murazumi, Charge d' Affairs *ad interim* of Japan, sent a letter to the Secretary of Commerce proposing a compromise. In that letter, Japan recognized "the need to take measures including the withdrawal of the objection mentioned above in order to avoid a confrontation between our two countries," but requested "an additional period of time for the purpose of minimizing the economic and social hardship of those who are engaged in commercial sperm whaling." J.A. at 78. Assuming that the Secretary had the discretion to determine when certification was appropriate, Japan requested

> that, as long as Japanese commercial whaling is conducted in a manner as indicated in the arrangement set forth in the Summary of Discussions attached to this letter, you not consider that the whaling will diminish the effectiveness of the Convention or its conservation program and not certify such whaling as provided for in the Pelly Amendment or the Packwood-Magnuson Amendment.

J.A. at 79. The Summary of Discussions memorialized negotiations between Dr. John V. Byrne, United States Commissioner to the International Whaling Commission, and Mr. Hiroya Sano, Director-General of the Fisheries Agency of the Japanese Ministry of Agriculture, Forestry and Fisheries. Significantly,

> [t]he heads of the delegations shared the view that [an arrangement whereby the United States Secretary of Commerce might refrain from "certifying" sperm whaling by Japanese nationals] might be possible, subject to satisfactory resolution of certain de-

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[1] This suit was filed on November 8, 1984, about three weeks after the negotiations commenced.

> tails and to approval and implementation by the cognizant authorities of each Government.

J.A. at 80.[2]

The proposed arrangement permitted Japan to take 400 sperm whales during each of the 1984 and 1985 coastal seasons without triggering certification, provided that Japan withdrew, by December 13, 1984, its objection to the 1981 Schedule. J.A. at 81. The agreement also permitted Japan to catch up to 200 sperm whales per season during the 1986 and 1987 coastal whaling seasons, and to continue minke and Bryde's whaling for two years beyond the general moratorium date. In exchange, Japan would withdraw its objection to the Commission moratorium on commercial whaling. The effect of this withdrawal would be that "Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season . . . ." J.A. at 81.

The Secretary of Commerce responded to the letter on the day on which it was sent. He stated:

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvests of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

J.A. at 83. On December 11, 1984, in reliance on the Secretary's promise, made on behalf of the United States, Japan withdrew its objection to the Schedule amendment. J.A. at 106. On April 5, 1985, Japan informed

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[2] There is no indication that the parties originally considered the term "cognizant authorities" to include the Judicial Branch of the United States government.

the Secretary that it would withdraw its objection to the moratorium within five days of a decision by this court in favor of the United States.

II.

There is a threshold question which has not been addressed by the majority: does this case present a justiciable question? Although "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker v. Carr*, 369 U.S. 186, 211 (1962), the justiciability issue is important and should ordinarily be decided before reaching the merits. *Cf. Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1977). One factor in determining the justiciability of a foreign affairs question is "the possible consequences of judicial action." *Baker v. Carr*, *supra*, 369 U.S. at 211-12. *Baker v. Carr* further warned about "embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. Although Congress joins the Executive in setting the agenda for foreign relations, *see Oetjen v. Central Leather Co.*, 246 U.S. 197, 302 (1918), "[t]he President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Yet, the district court's order has added the Judicial Branch's voice to this delicate process. The order, here approved, will in effect require the Secretary to dishonor the United States' commitment, upon which Japan relied in withdrawing its objection to the 1981 quota. Moreover, the district court's order has entangled the judiciary in foreign policy by causing Japan to condition its com-

mitment to honor the moratorium on a favorable decision by this Court.[3]

The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1547 & n.5 (Tamm, J., dissenting). For present purposes, however, it is not necessary to perform the "discriminating analysis"[4] required to determine whether this case is justiciable. The justiciability issue has serious constitutional implications which make it appropriate to bypass the question and proceed to the merits. *See Adams v. Vance*, *supra*, 570 F.2d at 954 n.7.

This is not to say that the factors which call justiciability into question are not relevant here. In my view, these factors heighten the need for forbearance by the courts in the absence of a clear command from Congress. In *Adams v. Vance*, for example, a panel of this court declined to reach the question of justiciability and proceeded to the merits, emphasizing that:

> A request for an order directing action by the Secretary of State in foreign affairs plainly constitutes such an instrusion into the core concerns of the executive branch]. Court must beware "ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President."

Id. at 954 (quoting *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973)).[5] *Adams* confirms that we should be

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[3] *Cf.* note 2 *supra*.

[4] *Baker v. Carr*, *supra*, 369 U.S. at 211.

[5] The *Adams* court made this statement in the context of an expedited appeal from a preliminary injunction, and its holding does not of its own force preclude a decision that the

particularly hesitant to contradict the Executive's interpretation of a statute relied upon to form an international agreement, unless that interpretation is clearly erroneous. I am not persuaded that the Secretary's interpretation of the Pelly Amendment was clearly erroneous.

III.

A.

The Pelly Amendment, by its terms, requires the Secretary of Commerce to examine the "manner" and "circumstances" under which foreign nationals are conducting fishing operations and, more important here, to determine whether fishing operations so conducted "diminish the effectiveness" of a fishery conservation program. This language means to me that some deviations from Commission quotas must be certified, but others need not be if the Secretary determines that the manner and circumstances of the fishing operations would not diminish the effectiveness of a program.

The majority concedes that "the critical statutory phrase, 'diminish the effectiveness,' is not defined in the statute." Majority Opinion at 19. To bridge the gap between what the statute actually says and a clear requirement to certify solely for violation of a quota, the Court turns to "traditional tools of statutory construction." [6]

The Court's analysis of the legislative history of the relevant statues is an impressive, but far from conclusive, demonstration that congressional sponsors of the Pelly Amendment intended that the Secretary certify any deviation by a nation or its nationals from a Commission quota. For example, the legislative history suggests that Congress intended the Secretary to certify

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Secretary has a statutory duty enforceable by mandamus. *Cf. Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1521 n.81 (D.C. Cir. 1984) (*en banc*).

[6] *Chevron, U.S.A. v. NRDC*, 104 S. Ct. 2778, 2782 n.9 (1984).

nations that "flaunt," "ignore," or flagrantly violate international quotas. The use of such language strongly implies that Congress understood the Pelly Amendment as giving the Secretary the discretion to distinguish between an egregious violation warranting certification and an accommodation which bent but did not break the program. Here, Japan has not simply "flaunted" the Convention quota—to the contrary, it has acknowledged the need to withdraw its objections to the 1981 Schedule Amendment. *See* J.A. at 78. Accordingly, Japan has negotiated an arrangement designed to accommodate its needs with the program articulated by the Convention. Regardless of whether the Secretary must certify nations that continue to violate quotas without entering into any agreement with the United States—a question which we need not decide—the legislative history does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis á vis* the 1981 quota and the moratorium "diminishes the effectiveness" of the Convention.

Nevertheless, if this statute involved domestic affairs, I might be able to endorse a decision based on this secondary evidence of congressional intent. For as the majority points out, "[t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt." *13th Regional Corp. v. U.S. Dept. of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). But the mandamus cases that

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[1] *See Council of and for the Blind of Delaware County v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*); *13th Regional Corp., supra*. Similarly, the remaining cases cited by the majority for its theory of legislative interpretation do not implicate foreign affairs. *See Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102 (1985); *Chevron, U.S.A., Inc. v. NRDC*, 104 S. Ct. 2778 (1984); *American Methyl Corp. v. EPA*, 749 F.2d 826 (D.C. Cir. 1984); *State of Montana v. Clark*, 749 F.2d 740 (D.C. Cir. 1984); *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

look to secondary evidence to resolve doubts about Congress' intent [7] do not involve "international relations." [8] Moreover, it is not a satisfactory answer to say that the Executive Branch and the Japanese could have read the same legislative history materials and reached the same conclusion reached by the majority and the court below. Nor would it have been appropriate to expect either Japan or the Executive Branch to seek a declaratory judgment about the Secretary's authority to enter into this agreement. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The international relations implications of this case persuade me that, in the absence of a congressional mandate, clear on its face, we should neither find nor enforce a ministerial duty.

B.

Even assuming that the Pelly Amendment can be interpreted by use of legislative history materials to impose an obligation to act that is both "peremptory, and clearly defined," it is important to recognize that "[t]he court has additional authority to refrain from issuing a writ, for the 'exercise of the power of mandamus is a matter committed to the sound discretion of the trial court.'" *13th Regional Corp., supra*, 654 F.2d at 760 (quoting *Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975)). Because "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion," *Whitehorse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373 (1955), "the case must be found by a court to be clear and compelling on both legal *and equitable* grounds for a writ to issue." *13th Regional Corp., supra*, 654 F.2d at 760 (emphasis added); *see id.* at 762-63. Neither the majority nor the court below have addressed these equitable considerations.

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[8] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

In my view, the equities (including the necessity of avoiding the thorny constitutional question related to justiciability) weigh heavily in favor of the Secretary. The Supreme Court has recently reminded us that "[g]reat nations, like great men, should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (quoted with approval in *CIA v. Sims*, 105 S. Ct. 1881, 1891 n.20 (1985)). The ultimate equity here is that the United States, speaking through the Secretary of Commerce, has given its word in apparent reliance on the language of an Act of Congress. Japan has made a reciprocal promise in reliance on the same language and the Secretary's interpretation of it. In these circumstances, I would not approve an order directing the Secretary to certify Japan.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1984
Civil Action No. 84-3414

No. 85-5251
AMERICAN CETACEAN SOCIETY, et al.
v.

MALCOLM BALDRIGE, Secretary of Commerce, et al. Appellants

JAPAN WHALING ASSOCIATION, et al.

No. 85-5252

AMERICAN CETACEAN SOCIETY, et al.

v.

MALCOLM BALDRIGE, Secretary of Commerce, et al.

JAPAN WHALING ASSOCIATION, et al., Appellants

Before WRIGHT and TAMM, Circuit Judges, and OBERDORFER, * District Judge.

ORDER

It is ORDERED by the court, sua sponte, that the opinion for the court filed by Circuit Judge Wright on August 6, 1985 be, and it is hereby, amended as follows:

Page 6: Change "actons" in line 2 of text to "actions"

Page 15: Insert "v. U.S. Dep't of Interior" after "Corp." in line 1 of the continuation of footnote 10

Page 18: Delete the period at the end of line 4 from the bottom of text

Page 25: Change "taught" in line 13 of text to "caught"

Page 34: Change "discription" in line 13 of text to "description"

Page 37: Change "The" in line 2 of the third full paragraph to "See"

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. 292(a).

APPENDIX B

OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CETACEAN SOCIETY, et al.,
Plaintiffs,
v.
MALCOLM BALDRIDGE, et al.,
Defendants,
and,
THE JAPANESE WHALING ASSOCIATION &
THE JAPANESE FISHING ASSOCIATION,
Defendant-Intervenors

Civil Action No. 84-3414

ORDER

In accordance with the Opinion issued of even date herewith, it is by the Court, this 5th day of March, 1985,

ORDERED that the plaintiffs' motion for summary judgment be and the same is hereby granted, and that the defendants' and defendant-intervenors' cross-motions be and the same are hereby denied, and it is

FURTHER ORDERED that the defendant-intervenors' motion to dismiss be and the same is hereby denied, and it is

FURTHER DECLARED AND ADJUDGED the defendant Baldridge and his subordinates, and defendant Schultz and his subordinates, have no discretion not to certify Japanese sperm whaling in violation of the IWC zero sperm whale quota, and reduce Japan's fishing allocation since such activities diminish the effectiveness of the International Convention for the Regulation of Whaling, and it is

FURTHER ORDERED that defendant Baldridge and his subordinates and defendant Schultz and his subordinates be permanently enjoined from agreeing not to certify, and from failing to certify, any whaling activities by nationals of Japan that violate IWC whaling quotas, and from agreeing not to reduce, and failing to reduce, Japanese fishing quotas in consequence of such certification, and it is

FURTHER ORDERED that defendant Baldridge shall forthwith certify to the President, pursuant to the Pelly

and Packwood-Magnuson Amendments, the Japanese sperm whaling which has taken place in violation of the IWC zero sperm whaling quota.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CETACEAN SOCIETY, et al.,)
Plaintiffs,)
v.)
MALCOLM BALDRIDGE, et al.,)
Defendants,)
and,)
THE JAPANESE WHALING ASSOCIATION & THE JAPANESE FISHING ASSOCIATION,)
Defendant-Intervenors)

Civil Action No. 84-3414

A P P E A R A N C E S

For the Plaintiffs, William D. Rogers, James A. Beat and John F. Libby of Arnold & Porter, Washington, D.C.

For the Defendants, F. Henry Habicht II, Assistant Attorney General, Donald A. Carr and Diane H. Kelly, U.S. Department of Justice, Washington, D.C., Peter H. Flournoy, of counsel, Office of the Legal Advisor, U.S. Department of State, Washington, D.C. and Robert McManus, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, D. C.

For the Defendant-Intervenors, Scott C. Whitney and Steven R. Perles, Washington, D.C.

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UNITED STATES DISTRICT COURT
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AMERICAN CETACEAN SOCIETY, et al.,
Plaintiffs,
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and,
THE JAPANESE WHALING ASSOCIATION & THE JAPANESE FISHING ASSOCIATION,
Defendant-Intervenors

Civil Action No. 84-3414

OPINION AND ORDER OF CHARLES R. RICHEY, UNITED STATES DISTRICT JUDGE

This action is before the Court on Cross-Motions for Summary Judgment, as well as a Motion to Dismiss for failure to state a claim upon which relief can be granted. The numerous plaintiffs in this case are all wildlife conservation groups which share a common dedication to preserving and protecting endangered species. The defendants are Secretary of Commerce Malcolm Baldridge and Secretary of State George Schultz, both being sued in their official capacity. In addition,

the Japanese Whaling Association and Japanese Fisheries Association (hereinafter "JWA/JFA") have been allowed into this action as defendant/intervenors.

Plaintiffs contend that Secretary Baldridge violated a clear non-discretionary duty when he failed to certify to the President that Japanese nationals were engaged in sperm whaling in violation of the International Whaling Commission's (hereinafter "IWC") zero sperm whale quota for the 1984-85 season. Plaintiffs seek a declaratory judgment from this Court that such failure to certify was in violation of the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976. 16 U.S.C. §§ 1821(e)(2)(A)(1) and (B). Plaintiffs also request that the Court declare and adjudge that such whaling activities by any nation in excess of the IWC quota is necessarily an activity which "diminishes the effectiveness" of the International Convention for the Regulation of Whaling (hereinafter "the Convention"), the multilateral treaty which the IWC oversees.

Additionally, plaintiffs seek a permanent injunction from this Court

enjoining both Secretaries Baldrige and Schultz, and their subordinates, from agreeing not to certify, and from failing to certify, any whaling activities by nationals of Japan that violate IWC whaling quotas, and from agreeing not to reduce, and from failing to reduce, Japanese fishing quotas in consequence of such certification.

The defendants argue that Secretary Baldridge's actions which give rise to this suit were within the scope of his discretion to determine what activities diminished the effectiveness of the Convention, and that his decision not to certify was actually designed to insure its continued effectiveness. Therefore, the defendants argue, the Packwood-Magnuson automatic sanction was never triggered. The JWA/JFA argue that the Japanese were never technically in violation of the Convention, and, therefore, the Japanese cannot be certified. In addition, they raise other arguments dealing with what they percieve as irregularities under the Administrative Procedure Act 5 U.S.C. §551, et seq. They have also filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6)

for failure to state a claim upon which relief can be granted. In this motion, the intervenors argue that plaintiffs fail to meet the appropriate standard for a permanent injunction in the nature of mandamus and that therefore the complaint cannot stand.

For the reasons set forth below, the Court denies the Motion to Dismiss, and grants the Plaintiffs' Motion for Summary Judgment.

FACTUAL AND STATUTORY BACKGROUND

For the past thirty five years, the international whaling industry has brought about the systematic devestation of the major whaling populations on this planet. Although a central focus of many cultures over the past centuries, whaling has gone beyond cultural identity and into the realm of international business. The whale was originally hunted for its oil, its ivory teeth and its meat. It was hunted in small numbers, as the technology of the early whalers limited their ability to catch more than a few whales each season. This has changed drastically, however, since the end of World War II. Improvements in technology, such

as larger and stronger whaling ships and explosive harpoons, made whaling as big business both practical and profitable. New uses for whale products began to be discovered. The whale oil, once used for heat and light, is now used as a high-grade industrial lubricant. The meat, only rarely used for human consumption, is a major ingrediant in pet food and agricultural feed. The whalers, unrestrained by any regulations regarding their activities, took as many whales as they could find. By the early 1960's, blue and humpback whales had been virtually exterminated, driven to "commercial extinction," where there were too few remaining to make hunting them worthwhile. (Garrett Affidavit at 1). By the early 1970's, the major populations of large baleen whales in the Antarctic and North Pacific oceans had been destroyed. Fin and sei whale populations had been likewise reduced to small percentages of their original levels. Id. The whaling industry then refocused its efforts on the remaining available species: the sperm whale, the Bryde's whale, and the smaller minke whale.

The International Convention for the

Regulation of Whaling, which created the IWC, arose as a result of the recognized need for some kind of coordinated regulation of international whaling. The Convention was signed in 1946 and entered into force on November 10, 1948. 62 Stat. 1716, T.I.A.S. No. 1849. Under the the terms of the Convention, global annual whaling quotas and regulations restricting whaling methods are to be established at annual and special meetings of the IWC. Convention, Art. V ¶1. Originally, the IWC was used as a vehicle for the control of whale oil prices. However, since 1972 it has steadily evolved as an agency promoting conservation rather than commercialization of whales.

a) The Pelly Amendment

The United States government was a signatory of the Convention and is a member nation in the IWC. It has consistently taken the role of enforcing the quotas as set by the IWC with the threat of economic sanctions against countries which fail to adhere to the IWC limits. In 1971, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. §1978, for the

express purpose of creating a sanction against countries that refused to conduct their fishing operations consistent with international fishery conservation programs. The Pelly Amendment states that when the Secretary of Commerce determines that nationals of a foriegn country are conducting fishing operations which "diminish the effectiveness" of any international fisheries conservation program to which the United States is a party, he shall so certify to the President. 22 U.S.C. §1978(a)(1). The President may then direct the Secretary of the Treasury to prohibit the importation of fish products of the offending nation. 22 U.S.C. §1978(a)(4). Within sixty days of certification, the President is required to notify Congress of any action taken as a result of such certification, or of his reasons for taking no action or taking only limited action against the offending nation. 22 U.S.C. §1987(b).

On November 12, 1974, the Secretary of Commerce certified both Japan and the Soviet Union under the Pelly Amendment. The IWC had set a quota of 5,000 Antarctic minke whales for the 1973-74 season. Both nations had objected to the quota

under the procedures set forth in the Convention. The Secretary determined, however, that when the Soviet Union took 4,000 minke whales and Japan took 3,713, that both countries had acted to "diminish the effectiveness" of the Convention. On January 19, 1975, former President Gerald R. Ford made it clear that any taking of whales in excess of IWC quotas would trigger the Pelly Amendment certification, saying that "exceeding the quotas will diminish the effectiveness of the program." White House Press Release, January 17, 1975. (Plaintiff's Brief at 8). The imposition of sanctions was forstalled, however, when both Japan and the Soviet Union then agreed to accept the 1974-75 quotas. Id.

The Pelly Amendment has been brought into play several times since. On December 14, 1978, the Secretary of Commerce certified Chile, Peru and the Republic of Korea for exceeding IWC quotas. At that time none of these nations were members of the IWC or signatories of the Convention. Within sixty days after certification, all three had either joined the IWC or committed to do so by the next scheduled annual meeting. Again, in 1979, the

threatened certification of Spain led that country to agree to adhere to the IWC fin whale quota for that year, despite having filed a formal objection. Preparations for the 34th International Whaling Commission Meeting: Hearings before the Subcomm. Human Rights and International Organizations of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 11 (1982) (Congressional Research Service Report).

b) The Packwood-Magnuson Amendment

In 1979, Congress determined that the Pelly Amendment, however effective, was inadequate to the task of persuading commercial whaling nations to adhere to IWC decisions. Accordingly, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1976 (hereinafter "Packwood-Magnuson"). 16 U.S.C. § 1821. That Act has, since 1976, regulated commercial fishing within the United States 200-mile fishery conservation zone. It provides for the Secretary of State to grant foriegn nations annual allocations of allowable levels of fishing within the 200-mile zone. Id.

Packwood-Magnuson amended that Act to provide that the Secretary of Commerce would have the responsibility to ascertain and certify whether "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaged in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." 16 U.S.C. §1821(e)(2)(A)(1). Upon such certification, the Amendment mandates that the fishing allocation of the offending nation "shall be reduced by the Secretary of State, in consultation with the Secretary [of Commerce], by not less than 50 percent." 16 U.S.C. §1821(e)(2)(B). If the certification by the Secretary of Commerce is terminated within one year, the suspended allocation may be reinstated. 16 U.S.C. §1821(e)(2)(C)(iii). If the certification is not terminated within one year, the suspended allocation is permanently rescinded and the Secretary of State "may not make any allocation to that country . . . until the certification is terminated." 16 U.S.C. §1821(e)(2)(D).

The threat of automatic sanctions under Packwood-Magnuson has proved to be

an effective incentive in the enforcement of the IWC regulations and quotas. In 1980, both the Republic of Korea and Taiwan agreed to adhere to IWC regulations not directly involving whaling quotas, when faced with the possibility of Packwood-Magnuson sanctions. Preparations for the 34th International Whaling Commission Meeting, supra, at 11. The former United States representative to the IWC views the automatic sanctions under Packwood-Magnuson to be the foundation upon which the present system of international whaling controls has been built. (Affidavit of Thomas Garrett ¶ 9).

c) The IWC whaling quotas

In 1981 the IWC voted to amend the quota tables to provide that no sperm whales could be taken in any future year unless a specific quota was established by the IWC for that year. The vote on that issue was 25 to 1, with Japan casting the lone opposition vote. Review of the 33rd International Whaling Committee Meeting: Hearing before the Subcomm. on Human Rights and International Orgainizations of the House Comm. on Foriegn

Affairs, 97th Cong., 1st Sess. 11 (1981) (Staff Report).

At the next annual meeting, in July, 1982, the IWC voted to impose a five year moratorium on all commercial whaling in order to allow depleted whale stocks to regenerate, and for scientists to have an opportunity to gather more extensive data on the populations and distributions of whale stocks to determine whether commercial whaling could be safely resumed at some future date. Review of the 34th International Whaling Commission Meeting, 97th Cong., 2d Sess. 17 - 19 (1982) (Staff Report). Of the member nations of the IWC, only Japan, the Soviet Union and Norway filed objections to the moratorium.

In July 1982, Japan requested, and was granted, two additional years of sperm whaling through the 1983-84 season. This additional grant was part of a compromise effort to insure passage of the general whaling moratorium to begin in 1986. No sperm whale quotas was established by the IWC for the 1984-85 season. Thus, under the terms of the 1981 amendment to the quota tables, any sperm whaling during the 1984-85 season would be in

violation of the zero quota which resulted.

d) The November 13, 1984 exchange of letters

The Japanese government, apparently well aware of the threat of Packwood-Magnuson sanctions, entered into negotiations with the United States Commissioner to the IWC. On November 13, 1984, the Department of Commerce released copies of an exchange of correspondence between Yasushi Murazumi, Japanese Charge d'Affaires in Washington, D. C., and Secretary Baldridge. Attached to the letter from Murazumi was a document entitled "Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific, November 1-12, 1984, Washington, D. C." This document described the negotiations between Mr. John V. Byrne, the U. S. Commissioner to the IWC, and Mr. Hiroya Sano, Director General, Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries of Japan. Later the same day, the Secretary responded by letter to Mr. Murazumi in which the Secretary pledged not to certify additional sperm

whaling by Japan during the 1984-85 and 1985-86 seasons, provided that the Japanese took the steps outlined in its letter. Specifically, the Secretary concluded that if Japan followed the promises made in its letter to eventually come into voluntary compliance with the IWC sperm whale and moratorium decisions, Japan would not be acting in a manner which would diminish the effectiveness of the convention, thus avoiding the triggering of Packwood-Magnuson sanctions.

The arrangement worked out between the Secretary and Japan would allow the Japanese whaling fleet to take up to 400 sperm whales during each of the 1984 and 1985 seasons, on the condition that they promise to cease all commercial sperm whaling at the end of the 1987 season. Japan in return agreed to withdraw its objection to the IWC quota table amendment which created the zero quota by no later than December 13, 1984. On December 11, 1984, the Japanese complied with this pledge and withdrew their objections to the amendment. The second part of the agreement was likewise conditioned on a

promise by the Japanese. If the Japanese agreed to cease all commercial whaling by April 1, 1988, then they may take up to 200 sperm whales in each of the 1986 and 1987 seasons, and take other species subject to limits acceptable to the United States, to be determined at a later time. The Japanese must withdraw their objection to the general moratorium by April 1, 1985, in order to avoid Packwood-Magnuson certification.

Even as the negotiations which led to the exchange of letters was taking place, the Japanese whaling fleet was out at sea to catch whales. On November 11, 1984, several members of the plaintiff organizations observed and photographed the return and butchering of two sperm whales at Wadaura, Japan. (Affidavit of J. Campbell Snowden). By letter dated November 19, 1985, counsel for the plaintiffs brought to the attention of the Secretary the fact of continued sperm whaling by the Japanese in violation of the IWC quotas, and requested immediate certification. On November 30, 1984, the Secretary, through the General Counsel of the National Oceanic and Atmospheric Administration, responded that he would

abide by the terms of the November 13 exchange of letters and would not certify Japan for the ongoing sperm whaling activities.

ANALYSIS

I. CERTIFICATION BY THE SECRETARY OF COMMERCE OF WHALING IN EXCESS OF THE IWC QUOTAS IS MANDATORY AND NONDISCRETIONARY.

When looking at the meaning of a statute, or a phrase therein, the Court must first look to the plain words of the statute. United States v. Apfelbaum, 445 U.S. 115, 121 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). The Pelly Amendment states unequivocably that "when the Secretary of Commerce finds" that a nation is acting so as to "diminish the effectiveness" of an international fisheries conservation agreement to which the United States is a party, he "shall certify such fact to the President." 22 U.S.C. §1978(a)(2) (emphasis supplied). That this is a mandatory obligation of the Secretary's is borne out by the legislative history of the Pelly Amendment, which is replete with phrases such as "required to certify," "must

certify," and "directs the Secretary to certify." See, 117 Cong. Rec. 34751 and 47053 (1971); H.R. Rep. No. 468, 92d Cong., 1st Sess. 6 (1971). The Packwood-Magnuson Amendment was enacted with much the same language. Once the Secretary has determined that a nation is acting so as to diminish the effectiveness of the International Whaling Convention, he must certify that fact to the President. 16 U.S.C. §1821(e)(2)(A)(i). Neither statute provides a definition of this key phrase. Only when the words of the statute are ambigous or unclear is it proper for a court to resort to legislative history to derive the intent of the lawmakers. United States v. Turkette, 452 U.S. 576, 580 (1981); Petry v. Block, 697 F.2d 1169 (D.C. Cir. 1983). Because the phrase which triggers certification is not clearly defined in either statute, the Court will look to the legislative history of both Pelly and Packwood-Magnuson to determine its meaning.

The issue in this case is in actuality very simple. It is whether the Secretary has any discretion under the statute to determine what actions will trigger the automatic sanction. The

defendants agree with the plaintiffs that the Secretary has a mandatory duty to certify once the circumstances which the phrase "diminishes the effectiveness of the Convention" seeks to define are found to be present. Rather, they argue that the determination of those circumstances has been left in the hands of the Secretary as a threshold discretionary decision to be made before certification becomes mandatory.

Plaintiffs, in their reply memorandum, concede that the Secretary may in fact have some discretion in this area, but that he may not utilize that discretion in the face of violations of IWC quotas, which the plaintiff contends to be the specific protection for which Packwood-Magnuson was created. They refer to numerous quotes of legislative history and a history of consistant agency interpretation as the basis for this argument.

a) Fishing In Violation Of Quotas Established Under An International Convention Was The Specific Wrong To Which Congress Intended Both Pelly and Packwood-Magnuson To Apply.

It appears clear from the legislative history that Congress in 1971 specifically

had in mind the particular situation present in this case, of a member nation to an international fisheries agreement filing an objection which, although permitted by the terms of the agreement, rendered the agreement itself futile and ineffective. In enacting the Pelly Amendment, Congress cited, as a prime example of a situation which would call for certification, the flagrant overfishing of Atlantic salmon by nations that had filed timely objections to the international ban on such fishing. The objection procedures in use there are similar to that included in the Whaling Convention. Congressman Pelly explained that his Amendment was needed because "under the terms of the governing convention, individual nations are permitted to exempt themselves from the decisions of the commission." 117 Cong. Rec. 34751-52 (1971). These violations of the salmon quota were cited as the primary basis of the need for the United States to use its economic influence so as to reverse the trend. 117 Cong. Rec. 34754 (1971) (statement of Rep. Clausen). It is also apparent that the Pelly amendment was to apply to violations of the

International Whaling Convention:

> "The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proved to be a cloak for over-exploitation on a grand scale." 117 Cong. Rec. 34752 (1971) (statement of Rep. Pelly)

A review of the legislative history of the Pelly Amendment leaves no doubt that the primary purpose behind creating a certification and economic sanction mechanism was to penalize nations that evade international fishery conservation measures by invoking technical treaty rights to exempt themselves from these measures. It was an attempt by Congress to enforce compliance with these international efforts which lacked any real enforcement power of their own. Defendants fail to cite any authority which contradicts this proposition.

This interpretation was also the basis for the Executive Branch position on the Pelly Amendment. The Department of State representative testified on

July 8, 1971, that the State Department viewed the bill as providing that

> . . . "if the majority of nations did accept a regulation or a ban on salmon fishing and that regulation applied to U.S. fishermen, and one of the nations of the convention or one of the nations not a member didn't agree with it, as far as trade with the United States was concerned, that such trade restrictions would be applied to fishery products of that nation." 1971 House Hearings 394.

Likewise, the Commerce Department, by letter to the House Committee on Merchant Marine and Fisheries, stated that the bill would "authorize the President to impose sanctions against countries which do not abide by that ban whether or not they are members of [the convention] and whether or not, if members of [the convention], they have accepted the ban." H.R. Rep. No. 468, 92d Cong. 1st Sess. 10 (1971). It is clear that the problem Congress sought to address with the Pelly amendment was the ability of other nations to ignore international conservation programs by invoking exemption privileges provided for in the treaties. The Executive branch fully agreed.

Thus does the phrase "diminish the effectiveness of" take on meaning and purpose. While many actions might result in a determination by the Secretary that certification is required, Congress specifically and unequivocably intended that such certification be made in the face of a nation attempting to exempt itself from its international fishery conservation obligations.

It appears equally clear that Packwood-Magnuson used the phrase in exactly the same manner as it was intended to be used in Pelly. Packwood-Magnuson was enacted to put teeth into the certification process by eliminating the discretion given the Executive whether to apply sanctions or not. The legislative history shows no evidence that Congress intended to alter the meaning of this key phrase, or that the concern about foreign nations exempting themselves out of international fisheries treaties had in any way abated. Indeed, the discussions before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment in 1979 clearly reflect that this concern was of paramount importance. Mr. Richard A.

Frank, then Administrator of the National Oceanic and Atmospheric Administration testified as follows:

> "We have used the Pelly amendment most recently in connection with Peru, Chile, and South Korea. They were the most flagerant violators because they were taking whales without regard to IWC quotas . . .
>
> ". . . IWC resolutions are not binding. If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply." Whaling Policy and International Whaling Commission Oversight, 96th Cong., 1st Sess. 311-12 (1979).

When asked later if he considered Japan to be at that time in violation of the convention, Mr. Frank replied, "no sir, we have not . . . They are not violating an IWC quota or an IWC prohibition." It was with this interpretation of the certification mechanism contained in Pelly that Congress enacted Packwood-Magnuson, which was endowed with the same language and the same certification trigger.

b) Agency Interpretation and Application Of Pelly And Packwood-Magnuson Has Consistently Resulted In Certification For Violations Of International Quotas.

The Executive Branch, prior to enactment of the Pelly Amendment in 1971, and until as recently as July 24, 1984, consistently has taken the position that intentional fishing in excess of duly established international quotas necessarily "diminishes the effectiveness" of the applicable fisheries conservation program. The Court has already quoted several examples of the Executive's position during the hearings on the Pelly amendment, and will not repeat them here except by reference. Similarly, it has already been noted that this position had not changed by the 1979 hearings on Packwood-Magnuson. Indeed, the Court is struck by the consistency and clarity of the position taken. This position has been echoed in the actions of the Executive as well as in its words.

One such example is found in Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978). This case involved the taking of bowhead whales by Alaskan natives. Although bowhead whales are one of the most endangered

species, small quotas had been allocated each year for the benefit of Alaskan natives because of the important role whaling has traditionally played in the Eskimo culture. In 1977, the IWC established no bowhead subsistance quota for 1978 based on IWC scientific findings. Although the Alaskan Eskimos vehemently opposed the decision, the United States did not file an objection which, under the terms of the Convention, would have resulted in an exemption to the zero quota. The Eskimos then filed suit to compel the Secretary of State to file an objection.

The objection sought by the Alaskans would have resulted in only a small number of bowhead whales being taken. However, the United States argued that the filing of an objection, even if later withdrawn, would have a devistating effect on the future effectiveness of the IWC and the Convention. Id. at 952. By affidavit, the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs testified that "A United States objection at this time would seriously weaken the effectiveness of the IWC as an instrument

of conservation." (Mink Affidavit at 7, 8). Further, the Administrator of the National Oceanic and Atmospheric Administration from 1970 to July 1977 testified:

> "In my judgment, the ability of the United States to maintain its posture of international leadership in the protection of whales, and to justify the imposition of sanctions upon other nations which object to IWC quotas, depends upon its own scupulous observance of such quotas." (White Affidavit at 2, 3).

In light of this strong sense of leadership in the international whaling community reflected in the Executive's words and acts, it appears a complete reversal for the Secretary of Commerce to agree not to certify a foreign nation whose nationals are intentionally whaling in violation of established IWC quotas. The Court does not agree with the defendants' application of the holding in Adams. Defendant would have the Court use Adams as a vehicle for denying the plaintiffs relief on foreign policy grounds. However, that case involved a suit to force the Executive to perform a discretionary act, namely to file an

objection to the zero bowhead whale qucta, after the Executive had deliberated and decided that such an objection was not in the best interest of either the United States or the Convention. Here, plaintiffs are seeking to compel the performance of a non-discretionary duty on the part of the Secretary of Commerce to certify any nation which is intentionally whaling in violation of the IWC quotas.

Further, if the Executive could interpret the taking of 15 or 20 bowhead whales as a threat to the entire IWC structure, the Court cannot see how the taking of 1200 sperm whales over a four-year period when no IWC quotas are in effect and unknown numbers of minke and Bryde's whales "acceptable to the United States after consultation with the Government of Japan" over a two year period when no IWC quotas are in effect, could possibly be countenanced.

Finally, the December 13, 1984 exchange of letters is inconsistant with the Secretary's own interpretation of the law stated in correspondence with Sen. Packwood less than six months before. Sen. Packwood had written concerning the Secretary's interpretation as it would

apply to the complete moratorium on commercial whaling to go into effect at the begining of the 1986 whaling season. The Secretary responded as follows:

> "You noted in your letter the widespread view that any continued commercial whaling after the IWC moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC . . .
>
> "Any government that chooses to ignore the commercial whaling moratorium implemented by the IWC and thereby diminishes the effectiveness of the IWC should be prepared to accept the consequences of this non-compliance." Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984).

It is inconceivable to this Court how the Secretary can reconcile his decision not to certify the Japanese sperm whaling with the clear purpose, intent and history of the law he is charged with enforcing, and with the equally consistent interpretation given that law by the agency and by the Secretary himself.

Therefore, there being no material facts in dispute, the plaintiffs' motion for summary judgment is granted, and the

defedants' cross-motion is denied.

c) The Intervenor's Motion For Summary Judgment Must Be Denied

The defendant-intervenors JWA/JFA have filed a motion for summary judgment which takes the position that the Secretary may never certify a nation which has filed a timely objection as provided for by the Convention. They argue extensively that the zero sperm whale quota and the general commercial whaling moratorium are illegal under the terms of the Convention and under international law. Therefore, the theory goes, if the quotas are themselves illegal, then Japan cannot be sanctioned for ignoring them. The intervenors also argue that certification is itself an illegal agency action, in violation of the Administrative Procedure Act, 5 U.S.C. §565, et seq., as the agency has never promulgated regulations defining the statutes, nor provided the Japanese with notice and hearing under 5 U.S.C. §556. Both of these arguments fail on their face and must be rejected by the Court.

Intervenors' entire discussion of the alleged impropieties which resulted

in the passage of the zero sperm whale quota and the general commercial whaling moratorium, while certainly offering some fascinating insights into the inner workings of such treaties, is entirely irrelevant to the issue in this case. This Court is not being asked to interpret or pass judgment on an international treaty or any actions taken as a result thereof. Rather, the only true issue in this case is whether there exists a nondiscretionary duty to certify and did the Secretary fail to so do. The relevant statutes make no mention of being applicable only to nations which are members of an international convention and which fail to timely object to the regulations of that convention. Rather, the plain words of both Pelly and Packwood-Magnuson operate to include any nation which "diminishes the effectiveness" of such a program. The statutes make no distinction between signatory or non-signatory, objector or non-objector. Indeed, in December of 1978, the Secretary certified Chile, Peru and South Korea under the Pelly Amendment at a time when none of these nations were members of the IWC.

Thus, it makes no difference that

the Japanese filed a valid objection, or whether the moratoria where "illegal." The statute only requires that the nation to be certified has acted so as to diminish the effectiveness of the Convention. The legislative history and consistant agency interpretation shows that any nation which exceeds the IWC quotas will be viewed as acting to diminish the effectiveness of the IWC and will be certified, regardless of the nations own view of the propriety of the quotas themselves.

Intervenors' Administrative Procedure Act argument is equally as facetious. Intervenor has ignored a fundamental of administrative law, that notice and hearing are only required for the taking of rights or property. Here, what is being taken is a revocable license, the license given to a foreign country to come into United States waters and fish. This is a privelege which does not give rise to a property right of the Japanese. See, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Further, it is clear that Section 556 of the APA, 5 U.S.C. §556, only sets forth the procedural rights that are available

when a trial-type hearing is required. Section 554 of the APA states that such a hearing is required "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . ." 5 U.S.C. §554(a). Accord, Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Sea-Land Service, Inc. v. Federal Maritime Commission, 653 F.2d 544, 551 n.18 (D.C. Cir. 1981); Marathon Oil Company v. Environmental Protection Agency, 564 F.2d 1253, 1263-64 (D.C. Cir. 1977). Neither Pelly nor Packwood-Magnuson require that a determination be made after a trial-type hearing on the record. Thus there has been no violation of either §556 or §554 of the APA.

Even assuming arguendo that these statutes did require a hearing with respect to certification, plaintiffs would still be entitled to the relief they seek. The sole factual issue to be determined prior to certification is whether the Japanese are taking sperm whales in excess of the established IWC zero quota. Because that fact is established in this Court proceeding, and is stipulated to by all parties, there is

no factual issue to be resolved by an evidentiary hearing. Cerro Wire & Cable Co. v. Federal Energy Regulatory Commission, 677 F.2d 124, 128-9 (D.C. Cir. 1982).

Nor is the Secretary required by law to adopt substantive interpretive regulations prior to exercising his duty to certify. The Supreme Court specifically rejected that argument in SEC v. Chenery Corp., 332 U.S. 194 (1947), holding that to require proceedings initially by rulemaking "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." Id. at 202. This holding has continued to be followed to this day. See, National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974); Towns of Concord, Norwood and Wellesley, Massachusetts v. Federal Energy Regulatory Commission, 729 F.2d 824, 830 (D.C. Cir. 1984); Arkansas Power and Light Co. v. Interstate Commerce Commission, 725 F.2d 716, 723 (D.C. Cir. 1984). The case on which Intervenors rely, Morton v. Ruiz, 415 U.S. 199 (1974), merely stands for the proposition that if an agency promulgates interpretive rules, it must do so

in conformance with APA procedures.

Further, intervenor's argument that an earlier treaty must take precedence over a later act of Congress does not apply in this case. The Supreme Court has held on numerous occasions for more than a century that such a treaty is subject to "such acts as Congress may pass for its enforcement, modification, or repeal." Head Money Cases, 112 U.S. 580, 599 (1884). See also, Moser v. United States, 341 U.S. 41 (1951); Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox. Ltd., 291 U.S. 138, 160 (1934); United States v. Payne, 264 U.S. 446, 448 (1924). Even without this authority, the Court does not view the Pelly and Packwood-Magnuson Amendments as conflicting with the Convention. There is nothing in the Convention which states that upon ratification of the treaty the United States gave up its right to persuade other nations to comply with the IWC whaling quotas established pursuant to that very convention. The Convention provides that Japan may exempt itself from IWC quotas by filing a timely objection. No provision of the Convention, however, restricts the right of any other

party to impose unilateral sanctions to enforce these same quotas, which is what the statutes at issue provide for, and what the plaintiffs seek here.

Finally, Intervenor's argument that the doctrine of primary jurisdiction should apply is incorrect. This case is a simple issue of statutory interpretation. Questions of law are particularly within the competence of the judiciary to resolve, and are not subject to initial agency consideration under the primary jurisdiction doctrine. Nader v. Allegheny Airlines, 426 U.S. 290, 305-6 (1976); Great Northern Ry. Co. v. Merchant's Elevator Co., 259 U.S. 285, 290-91 (1922).

II. THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS DENIED AS THE INCORRECT LEGAL STANDARD HAS BEEN APPLIED AND AS AN INJUNCTION IN THE NATURE OF MANDAMUS IS PROPER WHERE, AS HERE, A NONDISCRETIONARY ACT IS INVOLVED.

Intervenors have filed a motion to dismiss the complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). As basis for this motion, the cite Virginia

Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). Further, they argue that the Secretary does have discretion to determine what actions "diminish the effectiveness" of the Convention, therefore making the remedy of mandamus unavailable. The Court finds neither argument to be convincing, and, therefore, denies the motion.

Initially, as has been discussed above, when a foreign nation intentionally takes whales in excess of an established IWC quota, that action necessarily diminishes the effectiveness of the Convention and automatically triggers certification. That has been the consistant legislative and agency interpretation for almost fifteen years. Therefore, this is a nondiscretionary ministerial duty for which relief in the nature of mandamus is appropriate. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See also, Mississippi v. Johnson, 71 U.S. (4 Wall) 475, 498 (1866); 13th Regional Corporation v. U. S. Dept. of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980).

This is certainly such a case as envisioned by the law cited above. Congress created in 1971 a mandatory duty

on the part of the Secretary of Commerce to certify actions of foreign nationals that diminish the effectiveness of international fishery conservation programs. It added in 1979 a mandatory economic sanction required to be imposed by the Secretary of State in the case of the certification of actions that specifically diminish the International Convention for the Regulation of Whaling. The obligation to act is preemptory and clearly defined. The law not only authorizes the demanded action, but requires it. Nothing is left for discretion. Almost fifteen years of administrative interpretation and congressional understanding of, and reliance upon, the interpretation that intentional whaling in violation of IWC quotas triggers the certification process, have established a clear meaning of the phrase. There is quite simply nothing for the Secretary to decide. He must certify under the plain meaning of the statute.

Intervenors argue that plaintiffs have failed to meet the four-part test laid out in Virginia Petroleum Jobbers, supra. However, the Court is in agreement with the plaintiffs that that case

has no application to a request for a permanent injunction. Here, plaintiffs' motion for summary judgment seeks a final determination of the merits of the case and an award of permanent relief. Thus, Virginia Petroleum Jobbers is irrelevant for purposes of this case.

The correct standard to be applied in a case such as this is that enunciated in Council of and for the Blind of Delaware County Valley v. Regan, 709 F.2d 1521, 1533 (D.C. Cir. 1983), which established a three-pronged test for mandamus relief. Such relief is available if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." Id. Plaintiffs have passed all three prongs in this case and are therefore entitled to the permanent injunction which they seek. Plaintiffs have a clear right to relief and defendants have a clear duty to act, as discussed above. Most importantly, there is no other remedy available which will have the same effect of accomplishing the plaintiffs' purpose. Plaintiffs seek to protect and preserve whale stock left on this planet after

years of systematic decimation. Pelly and Packwood-Magnuson were enacted to this same end, and plaintiffs now seek to compel the Secretary to invoke these statutes as is his duty. There is no other form of relief available which would serve the same purpose. No amount of damages or alternative action by the defendants would have the same effect. Therefore, the motion to dismiss is denied, and the permanent injunction will issue under 28 U.S.C. §1361.

CONCLUSION

The Court holds here that the Secretary of Commerce had a clear and non-discretionary duty to certify the Japanese whaling in excess of the established IWC quotas. By not doing so, the Secretary has ignored the plain intent of Congress, and the historic significance of United States sanctions in the sphere of international whale conservation. The Secretary of Commerce may not unilaterally, or even bilaterally with the Japanese, dismiss the mandate of the IWC so as to proceed with his own particular vision of whale preservation. Congress has not given him that authority, and has, in

fact, explicitly created an automatic sanction to prevent this very situation. Congress, in enacting Pelly in 1971 and Packwood-Magnuson in 1979, wanted to send out a clear message to the world that the United States was committed to being in the vanguard of the fight to preserve the whale. The Secretary may not now distort his clear Congressional mandate by permitting a foreign nation (here Japan) to violate the IWC quotas without that nation facing the immediate consequences as set forth by the above-mentioned statutes.

In view of the foregoing, the Court, by Order of even date herewith, will grant the plaintiffs' motion for summary judgment, deny the defendants' motion for summary judgment and deny the defendant intervenors' motions for summary judgment and to dismiss, and order the defendants Baldridge and Schultz to immediately certify to the President that Japan is in violation of the IWC sperm whaling quota and enjoin them permanently from agreeing not to reduce, or failing to reduce, Japanese fishing quotas in consequence of such certification, and thus save another vital national, if not

international, goal of the preservation of an almost extinct species of vital importance to humankind.

March 5, 1985
date

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX C

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Wright, Circuit Judge; and Oberdorfer, United States District Judge for the District of Columbia*

O R D E R

Upon consideration of the petition for rehearing of apellants' Japan Fisheries Association, et al., it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

*Sitting by designation pursuant to 28 U.S.C. §292(a).

Judge Tamm was a member of the panel that heard oral argument and decided this case. He died on September 22, 1985, and did not participate in the making of this order.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Robinson, Chief Judge; Wright, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The suggestion for rehearing en banc of appellant Japan Fisheries Association, et al., has been circulated to the full Court and a majority of the active judges of the Court have not voted in favor thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

Judges Ginsburg, Bork, Scalia and Starr would grant rehearing en banc and are in substantial agreement with the views expressed in Judge Oberdorfer's dissent from the panel opinion.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Wright, Circuit Judge; and Oberdorfer, United States District Judge for the District of Columbia*

O R D E R

Upon consideration of the federal appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

*Sitting by designation pursuant to 28 U.S.C. §292(a).

Judge Tamm was a member of the panel that heard oral argument and decided this case. He died on September 22, 1985, and did not participte in the making of this order.

United States Court of Appeals
for the District of Columbia Circuit

No. 85-5251

American Cetacean Society, et al.

v.

Malcolm Baldridge, Secretary of Commerce, et al.
And Consolidated Case No. 85-5252

BEFORE: Robinson, Chief Judge; Wright, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The suggestion for rehearing en banc of the federal appellants has been circulated to the full Court and a majority of the active judges of the Court have not voted in favor thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher

GEORGE A. FISHER, CLERK

Judges Ginsburg, Bork, Scalia and Starr would grant rehearing en banc and are in substantial agreement with the views expressed in Judge Oberdorfer's dissent from the panel opinion.

APPENDIX D

Embassy of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

November 13, 1984

Dear Mr. Secretary:

I am writing to you concerning the recent meetings between the representatives of the Government of Japan and the Government of the United States on the subject of commercial sperm whaling in the western division stock of the North Pacific.

As you know, the Government of Japan is keenly aware that the whaling issue poses a threat of friction between our two countries. The Government of Japan wishes to resolve this issue as quickly and amicably as possible to avoid a confrontation which might be caused by the application of United States domestic statutes, namely Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) and Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood-Magnuson Amendment).

Unfortunately, while both Governments are Parties to the International Convention for the Regulation of Whaling (the Convention) and while we both share the concern for the general objectives of the Convention, there are certain differences between our two countries which arise from our different cultural and domestic situations.

As you know, footnote 1 added in 1981 to Table 3 of the Schedule to the Convention prohibits the commercial harvest of sperm whales from the

western division stock of the North Pacific unless the International Whaling Commission affirmatively decides otherwise. The Government of Japan has lodged an objection to footnote 1, in accordance with the provision of paragraph 3 of Article V of the Convention, and is therefore not bound by the footnote.

The Government of Japan, recognizing the need to take measures including the withdrawal of the objection mentioned above in order to avoid a confrontation between our two countries, seeks an additional period of time for the purpose of minimizing the economic and social hardship of those who are engaged in commercial sperm whaling. The Government of Japan endeavors to take appropriate measures in order to meet this purpose.

I therefore request that, as long as Japanese commercial whaling is conducted in a manner as indicated in the arrangement set forth in the Summary of Discussions attached to this letter, you not consider that the whaling will diminish the effectiveness of the Convention or its conservation program and not certify such whaling as provided for in the Pelly Amendment or the Packwood-Magnuson Amendment.

Sincerely yours,

/s/ Yasushi Murazumi
Yasushi Murazumi
Charge d'Affaires ad interim
of Japan

The Honorable
Malcolm Baldrige
The Secretary of Commerce
Washington, D.C. 20230

SUMMARY OF DISCUSSIONS ON COMMERCIAL SPERM WHALING IN THE WESTERN DIVISION STOCK OF THE NORTH PACIFIC, NOVEMBER 1-12, 1984, WASHINGTON, D.C.

DR. JOHN V. BYRNE, United States Commissioner to the International Whaling Commission

MR. HIROYA SANO, Director-General, Fisheries Agency, Ministry of Agriculture, Forestry and Fisheries, the Government of Japan

The latest in a series of bilateral discussions between Japan and the United States were conducted in Washington, D.C., November 1-12, 1984, in an effort to determine whether it would be possible, in accordance with the laws and regulations in effect in each country, to develop an arrangement whereby the United States Secretary of Commerce might refrain from "certifying" sperm whaling by Japanese nationals, if they take sperm whales under the objection of the Government of Japan to footnote 1 to Table 3 of the Schedule to the International Convention for the Regulation of Whaling, 1946 (the Convention). The heads of the delegations shared the view that such an arrangement might be possible, subject to satisfactory resolution of certain details and to approval and implementation by the cognizant authorities of each Government. The essential points of such a possible arrangement would be the following:

1. (A) The Government of Japan may permit a catch of 400 sperm whales during each of the 1984 and 1985 coastal seasons, subject to the provisions

on by-catch of females as set forth in footnote 2 to Table 3 of the Schedule (dated November, 1983) to the Convention.

(B) If, by December 13, 1984, the Government of Japan withdraws its objection, lodged November 9, 1981 under paragraph 3 of Article V of the Convention, effective on or before April 1, 1988, the United States would not consider sperm whaling permitted under sub-paragraph (A) above to diminish the effectiveness of the Convention or its conservation program, and would therefore not certify such sperm whaling as provided for in Section 8(a) of the Fishermen's Protective Act (the Pelly Amendment) or Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (The Packwood-Magnuson Amendment).

2. If, by April 1, 1985, the Government of Japan withdraws its objection, lodged November 4, 1982, to paragraph 6(e) of the Schedule, effective such that Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season, the United States would not consider that whaling specified below would diminish the effectiveness of the Convention or its conservation program and would not certify such whaling under the Pelly Amendment or the Packwood-Magnuson Amendment, if such whaling were limited to the following species and catch limits:

1986 and 1987 Coastal Whaling Seasons

Western Division, North Pacific sperm whales -- 200 per season, subject to the provisions on by-catch of females as set forth in footnote 2 to Table 3 of the

Schedule (dated November, 1983) to the Convention;

Okhotsk Sea-West Pacific minke whales -- catch limits acceptable to the Government of the United States after consultation with the Government of Japan;

Western North Pacific Bryde's whales -- catch limits acceptable to the Government of the United States after consultation with the Government of Japan; and

1985/1986 and 1986/1987 Pelagic Whaling Seasons

Southern Hemisphere minke whales Catch limits acceptable to the Government of the United States after consultation with the Government of Japan.

The Secretary of Commerce
Washington, D.C. 20230

November 13, 1984

Mr. Yasushi Murazumi
Charge d'Affaires ad interim
of Japan
Embassy of Japan
2520 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Murazumi:

Thank you for your letter about the recent bilateral consultations between representatives of our governments on the Japanese harvest of sperm whales from the western division stock of the North Pacific and the possibility that I, as Secretary of Commerce, may certify any confirmed harvest of sperm whales by Japanese nationals.

After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvests of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with

paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes. Moreover, in deciding that Japanese commercial whaling in accordance with paragraph 2 of that Summary of Discussions would not thwart the essential conservation purposes of the IWC, I have noted the apparent purpose of the IWC in having itself provided for a delayed effective date of paragraph 10(e).

This arrangement does not insulate from certification any Japanese whaling in excess of the 1984-85 quota for Southern Hemisphere minke whales. I urge that the Government of Japan comply with that quota. Furthermore, the withdrawals of your government's objections to footnote 1 to Table 3 and paragraph 10(e) of the Schedule would be irrevocable, notwithstanding their prospective effective dates.

Finally, in judging whether the Government of the United States would accept the catch limits for the 1986 and 1987 coastal seasons and 1985/86 and 1986/87 pelagic seasons as contemplated in paragraph 2 of the Summary of Discussions, the Government of the United States would be guided by the most recent quota voted by the IWC prior to those seasons.

Our purpose in recent consultations with the Government of Japan has been to encourage adherence by the Government of Japan to all provisions of the Convention's Schedule. We regard the provisions of paragraph 10(e) of the Schedule to be of central importance to the rational conservation and management of the world's remaining whale stocks. This is reflected in President Reagan's 1981 letter to each of the IWC

Commissioners encouraging them to take action along the lines now reflected in paragraph 10(e) of the Schedule.

Sincerely,

/s/ Malcolm Baldrige
Malcolm Baldrige
Secretary of Commerce

D9

[Letter to Secretary of Commerce Baldrige]

Ministry of Foreign Affairs
Tokyo, Japan

April 5, 1985

Dear Mr. Secretary,

As a result of the recent talks held in Washington, D.C. between you and Mr. H. Sano, Director-General of the Fisheries Agency of Japan, I refer to:

- the objection lodged by the Government of Japan on November 4, 1982 to subparagraph 10(e) of the Schedule to the International Convention for the Regulation of Whaling, 1946 (the Convention),

- the arrangements on commercial whaling reflected in the letters exchanged between you and then Charge d'Affaires ad interim Mr. Y. Murazumi on November 13, 1984, and

- the order dated March 5, 1985 of the United States District Court for the District of Columbia in the lawsuit styled American Cetacean Society, et al. v. Baldrige, et al., and the stay of such order pending appeal, granted on March 18, 1985 by the United States Court of Appeals for the District of Columbia Circuit.

I am authorized to inform you that the Government of Japan will, by written notice to the International Whaling Commission (IWC), withdraw the aforementioned objection within five days of a decision by the Court of Appeals in favor of the United States Government. My Government's

withdrawal would be effective such that Japanese commercial coastal whaling will cease following the 1987 coastal season and Japanese commercial pelagic whaling will cease following the 1986/87 pelagic season, but would lapse by its own terms only if at any time before the end of the 1987 commercial coastal whaling season, the United States Secretary of Commerce receives a final, unappealable order from any United States court of competent jurisdiction requiring certification of Japanese whaling activities which are addressed by, and consistent with, the arrangements reflected in the exchange of letters referred to above.

With regard to the catch limits for the 1986 and 1987 coastal season (except those for the Western Division, North Pacific Sperm Whales) and the 1985/86 and 1986/87 pelagic seasons as contemplated in the November 13, 1984 arrangements, I wish to inform you that the Government of Japan understands that the United States will not regard catch limits for those seasons as diminishing the effectiveness of the Convention or its conservation program if such catch limits are consistent with the decisions made at the 36th Annual Meeting of the IWC, unless the levels of the stocks in question as assessed by the Scientific Committee of the IWC at its future meetings, change significantly.

Finally, I wish to confirm the understanding of the Government of Japan that (i) the date of April 1, 1985 referred to in paragraph 2 of the Summary of Discussions appended to Mr. Murazumi's letter to you of November 13, 1984 shall be deemed extended to a date five days after the Court of Appeals shall enter an order in favor of the United States Government in the litigation described above, and (ii) withdrawal of the objection of the

Government of Japan to paragraph 10(e) of the Schedule to the Convention on the terms, conditions and understandings set forth in this letter shall be deemed by the United States to satisfy the condition referred to in paragraph 2 of the Summary of Discussions referred to above. I request that you confirm the understandings of my Government in your reply to this letter.

Sincerely,

/s/ Shintaro Abe
Shintaro Abe
Minister for Foreign Affairs
of Japan

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

His Excellency
Shintaro Abe
Minister of Foreign Affairs of Japan
Tokyo

Dear Mr. Minister:

I acknowledge the receipt of your letter dated April 5, 1985, regarding Japan's intentions with respect to its pending objection to paragraph 10(3) of the Schedule to the International Convention for the Regulation of Whaling. I hereby inform you the Government of the United States concurs with the understandings of the Government of Japan, as described in your letter.

Sincerely

/s/ Clarence Brown
Acting Secretary of
Commerce

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING
Dec 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949 (Excerpts)

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling signed in London on June 8, 1937 and the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

1. The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; g) methods of measurement; and (h) catch returns and other statistical and biological records.

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety

days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

* * *

PELLY AMENDMENT
Fishermen's Protective Act § 8(a), 85 Stat. 768, 22 U.S.C. § 1978(a)(Excerpts)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification to President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent

that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification to Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation of Fish Products From Offending Country Prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

* * *

PACKWOOD - MAGNUSON AMENDMENT
Magnuson Fishery Conservation and Management Act § 201(e)(2), 90 Stat. 337, 16 U.S.C. § 18321(e)(2)(Excerpts)

* * *

(e)(2) (A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)).

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [201(e)(1), 16 U.S.C. § 1821(e)(1)(A)] that --

(i) is in effect for that foreign country on the date of issuance; or

(i) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

* * *

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-954

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION AND
JAPAN FISHERIES ASSOCIATION, PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-954

JAPAN WHALING ASSOCIATION AND
JAPAN FISHERIES ASSOCIATION, PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioners Japan Whaling Association and Japan Fisheries Association seek review of a decision holding that the Secretary of Commerce has an automatic, nondiscretionary duty to certify that Japan has diminished the effectiveness of the International Convention for the Regulation of Whaling (ICRW), 62 Stat. 1716 *et seq.* (*entered into force* Nov. 10, 1948). That certification would lead to the imposition of severe economic sanctions against Japan. The federal respondents have also petitioned for certiorari in this case. See *Baldrige* v. *American Cetacean Society*, petition for cert. pending, No. 85-955 (filed Dec. 4, 1985).

1. Japan, an important foreign ally culturally and historically committed to whaling, presently declines to follow ICRW whale harvesting quotas. However, Japan has entered into an agreement with the United States which is to culminate in the withdrawal of its objections to the treaty

quotas and the termination of its commercial whaling activities by April 1, 1988 (Pet. App. D1-D8). That agreement has failed to satisfy various private wildlife organizations. They brought a mandamus action against the Secretary of Commerce and the Secretary of State, demanding certification and sanctioning of Japan under Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment), 22 U.S.C. 1978(a), and Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment), 16 U.S.C. 1821(e)(2).[1]

Petitioners intervened as defendants in that action. The district court ruled that the Secretary of Commerce has a nondiscretionary duty to certify Japan (Pet. App. B1-B47). The government and petitioners took separate appeals from that decision. The court of appeals consolidated those appeals and affirmed (*id.* at A1-A50).[2]

2. As we explain more fully in our pending petition (see 85-955 Pet. 10-23), this Court should correct the court of appeals' erroneous decision on this important matter. The express language of the Pelly and Packwood Amendments grants the Secretary substantial discretion in determining whether a country has diminished the effectiveness of the ICRW (see *id.* at 11-13). The legislative history supports this interpretation (see *id.* at 13-18). And even if the language and legislative history were unclear, the Secretary's interpretation of the statute would be entitled to controlling

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[1]The Pelly and Packwood Amendments provide that the Secretary of Commerce shall certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the ICRW. 16 U.S.C. 1821(e)(2); see 22 U.S.C. 1978(a). Certification results in the mandatory imposition of severe economic sanctions. See 16 U.S.C. 1821(e)(2)(B). See also 22 U.S.C. 1978(a)(4).

[2]The facts are set forth in greater detail in the goverment's petition. See 85-955 Pet. 3-10.

weight (see *id.* at 18-19). Moreover, like petitioners, we contend (*id.* at 19-20) that mandamus is inappropriate in this case.

Although we agree with much of petitioners' submission, we disagree on one basic point. Petitioners seemingly contend (Pet. 3, 20-22) that the Secretary cannot certify an ICRW member country that has filed a valid objection, pursuant to the ICRW's provisions, excepting the country from compliance with the harvest quotas.[3] They suggest (Pet. 20-22) that certification is inconsistent with both the United States' treaty obligations under the ICRW and with the Pelly and Packwood Amendments. In contrast to the respondent wildlife organizations, who argue that the Secretary *must* certify a country whenever its nationals do not comply with an ICRW quota, petitioners contend that the Secretary may *never* certify a country that has filed a valid objection.

Petitioners maintain (Pet. 21) that certification of a nation that is not in technical violation of the ICRW undermines rights secured by the treaty. But nothing in the ICRW forbids individual nations from adopting measures, as part of their domestic law, that impose more stringent obligations on ICRW members than the ICRW itself provides. Congress, in recognizing treaty rights, may nonetheless attach adverse consequences to their exercise. See *Moser* v. *United States*, 341 U.S. 41 (1951). In the present situation, Congress has authorized the Executive Branch to determine if whaling activities — whether or not permissible under the ICRW — diminish the ICRW's effectiveness.

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[3]The ICRW provides that a member country may object to a harvest quota; if the country files a timely objection, it is excused from compliance with the quota. See ICRW art. V, 62 Stat. 1718-1719.

Congress's action, promoting the implementation of the ICRW, is wholly consistent with the ICRW's goals.[4]

Thus, on this basic statutory question, the sharply contrasting positions advanced by petitioners and the respondent wildlife organizations are both unsound. Congress has carefully steered a middle course between those extremes. The Pelly and Packwood Amendments authorize the Secretary to exercise discretion in determining what activities diminish the effectiveness of the ICRW; they neither prohibit nor require certification of countries that permit whaling, under valid objection, in excess of ICRW quotas. Instead, they entrust the certification decision to the Executive Branch as a matter of informed foreign policy and conservation judgment.

3. The court of appeals' decision primarily presents questions of Executive Branch discretion in matters of foreign relations. As petitioners recognize (Pet. 13), the government is best situated to address those questions authoritatively. In our view, however, petitioners, who have been active in this case since its inception and present questions similar to those presented in the government's petition, would add a useful perspective to the Court's consideration of the case.

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[4]Indeed, the legislative history reveals that Congress understood that the Executive Branch would have discretion to certify nations that, while complying with treaty requirements, nevertheless take actions that diminish the treaty's effectiveness. See H.R. Rep. 92-468, 92d Cong., 1st Sess. 5 (1971); *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 317 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, together with the government's petition in No. 85-955, and that the cases should be consolidated for this Court's review.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-354, 85-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

As Petitioners Baldrige and Schultz point out, the Packwood-Magnuson Amendment calls for the Secretary of Commerce to certify those nations whose nationals conduct whaling operations that "diminish[] the effectiveness of the International Convention for the Regulation of Whaling." 16 U.S.C. § 1821(e)(2).

The consequent question presented is whether the Secretary of Commerce can refuse to certify Japan's defiance of the ban on whaling decreed under the Convention by the International Whaling Commission.

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* Pursuant to Rule 28.1, Respondents state that none of the Respondents that are incorporated organizations have any parent, subsidiary or affiliate that has any outstanding securities in the hands of the public.

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IN THE

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No. 85-955

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, De-

fenders of Wildlife, Friends of the Earth and Thomas Garrett respectfully request the Court to deny the petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

RESPONDENTS' STATEMENT OF THE CASE

The ultimate issue in this proceeding, which Petitioners omit to mention, is whether Japan shall continue the "systematic devastation" of the remaining great whales of the world's oceans for commercial purposes (App. 60a).[1] These creatures are the largest animals ever to inhabit our planet. The sperm whale has the most complex brain ever known. It lives in a social system that is just beginning to be understood by man. That system seems to grant a special leadership and reproductive role to the very bulls which are the natural target of the Japanese hunters. Any further reduction in their numbers could well be decisive to the collapse of the species.

The International Convention for the Regulation of Whaling ("Convention"), which created the International Whaling Commission ("IWC"), entered into force on November 10, 1948, 62 Stat. 1716, T.I.A.S. No. 1849, and arose out of a recognized need to "establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks * * *." Preamble, 62 Stat. 1716. Under the Convention, the IWC establishes whaling quotas and other regulations governing whaling methods and seasons. Art. V, 62 Stat. 1718. From the outset of the IWC's existence, the establishment of harvest limits has been the very heart of its work.

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[1] "App." refers to the appendix to the petition for a writ of certiorari filed on behalf of the Federal Petitioners. "J.A." refers to the Joint Appendix filed by the parties in the court below.

The Convention itself has no teeth. The Convention does not affect nonmember nations and expressly allows even member countries to exempt themselves from any of the IWC's decisions to which they object. Art. V, 62 Stat. 1719. To provide enforcement leverage for the IWC's quota determinations, Congress in 1971 enacted Section 8(a) of the Fishermen's Protective Act (the "Pelly Amendment") to provide a trade sanction that would compel adherence to fishing quotas established by international agreement, 22 U.S.C. § 1978(a). During the next seven years, the Secretary of Commerce implemented the Pelly Amendment by "certifying" that five nations—Japan, the Soviet Union, Chile, Peru and the Republic of Korea—were whaling in violation of IWC quotas (J.A. 168-72, 177-86). In each case, however, the President exercised his discretion under the Pelly Amendment *not* to impose trade sanctions in light of assurances from the offending countries that they would comply with the IWC's quotas the next year (J.A. 175-76, 193-96).

This course of events was unacceptable to Congress. In 1979, Congress adopted Section 201(e)(2) of the Fishery Conservation and Management Act (the "Packwood-Magnuson Amendment") to create a nondiscretionary sanction against countries that violate IWC whaling quotas or otherwise "diminish the effectiveness" of the Convention. Packwood-Magnuson mandates that the fishing allocation in United States waters of the offending country "shall be reduced by the Secretary of State * * * by not less than 50 percent." 16 U.S.C. § 1821(e)(2)(B).

These actions by Congress came none too soon. Foreign whalers, having all but destroyed the world's populations of blue, humpback and right whales (J.A. 127), had begun to train their harpoons on what they perceived to be the principal remaining "available" species: the sperm whale, the Bryde's whale, and the minke whale. In 1981 the decimation of the North Pacific

sperm whale led the IWC to adopt a zero quota for that stock by a 25-1 vote with only Japan opposed (J.A. 129). In 1982, after an intense, decade-long review of the scientific data, the IWC took the historic step of establishing, by the vote of over three-quarters of its members, a moratorium on all commercial whaling to commence in 1986 (J.A. 129).[2]

Japan has refused to abide by these crucial decisions of the IWC. Accordingly, on November 8, 1984 Respondents filed this action in the United States District Court for the District of Columbia, seeking to require the Secretary of Commerce to certify Japan under Packwood-Magnuson and thereby set into motion the automatic sanctions that Congress intended (App. 12a). On March 5, 1985, the district court granted respondents the relief they sought (App. 56a-86a). On August 6, 1985, the court of appeals affirmed (App. 1a-55a).

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[2] Petitioners suggest that the only thing at stake here is whether Japanese whaling stops now or continues until 1988. Thus, Federal Petitioners state that Japan has agreed to "effectively *terminate its commercial whaling industry* by April 1, 1988" (Federal Petitioners' Petition for a Writ of Certiorari at 4) (emphasis supplied). The continued taking of sperm, minke and Bryde's whales in the interim is serious enough, and creates a grave risk to the existing diminished populations, as the IWC found. But in fact it is by no means certain that the Japanese "industry" will be shut down, even in 1988. The agreement does not say as much; it merely provides for the withdrawal of Japan's IWC objection to the moratorium. Furthermore, as we pointed out to the court below (Tr. Feb. 20, 1985, at 17) within weeks of the Baldrige-Murazumi agreement, Japan had proposed a new category of sperm and Bryde's whaling to cover what it called "coastal subsistence whaling." This strongly suggests that Japan intends under the Baldrige-Murazumi arrangements to continue its "industry" well after 1988.

REASONS FOR DENYING THE WRIT

Summary of Argument

Petitioners seek to portray the judgment below as one which "trenches . . . deeply on the conduct of foreign affairs" (Int. Pet. at 13) and departs from the "classical deference" afforded the political branches in matters of foreign policy (Fed. Pet. at 10).[3] In fact, Congress created the United States' 200-mile Fishery Conservation Zone and conditioned the rights of foreign nationals to fish within that Zone on the obligation of their home countries not to diminish the effectiveness of IWC quotas. It was by statute, not by the President's inherent powers in matters of foreign policy, that ministerial responsibility to carry out the legislative scheme was placed in the Executive Branch. When the conduct of the Executive Branch clearly contravenes the "overall tenor" of Congress' legislation, the Executive's power is at its "lowest ebb" and will not be sustained by the courts. *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-669, 679 (1981) (quoting in part *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring).

In 1971, Congress enacted the Pelly Amendment specifically to create a trade sanction against countries that violate international fishing quotas or otherwise "diminish the effectiveness" of international fishery conservation programs. In 1979, Congress enacted Packwood-Magnuson to create an additional, mandatory economic sanction against nations that violate IWC limits. It did so despite the same pleas from the Executive Branch for "discretion" and "diplomatic flexibility" that peti-

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[3] "Fed. Pet." refers to the petition for a writ of certiorari filed by Federal Petitioners Baldrige and Schultz. "Int. Pet." refers to the petition for a writ of certiorari filed by Intervenor Petitioners Japan Whaling Association and Japan Fisheries Association.

tioners now redirect to this Court. Finally, Congress adopted Packwood-Magnuson in reliance on the consistent administrative practice of certifying *all* nations that intentionally contravened IWC quotas and in further reliance on explicit assurances from the Department of Commerce that the future taking of whales in contravention of the IWC quotas would mandatorily and automatically be certified by the Secretary—assurances repeated by Petitioner Baldrige only months before he made the arrangement with Japan at issue here.

On the strength of this extraordinarily pointed legislative history, the petitions for certiorari should be denied. The judgment of the court of appeals is correct and presents no conflict with the decisions of this Court or any other court of appeals. Nor is there presented a question of federal law sufficient to warrant this Court's attention. The Packwood-Magnuson Amendment has never before been the subject of litigation and there is no serious likelihood that the question will arise again. The most that Petitioners can suggest is that an executive agreement with Japan is at stake. But because the Executive Branch did something that it did not have the statutory authority to do is no reason to grant a writ of certiorari. This is particularly so when granting the writ would occasion delay in bringing to an end Japan's irreparable slaughter of thousands of minke, Bryde's and sperm whales in the North Pacific and Antarctic Oceans.

The petitions should be denied because the resolution by the courts below of the legal questions presented was, as we shall now show, entirely in harmony with this Court's teachings and represented no departure from accepted proceedings.

I. THE PACKWOOD-MAGNUSON AMENDMENT REQUIRES THE SECRETARY OF COMMERCE TO CERTIFY INTENTIONAL VIOLATIONS OF IWC QUOTAS

A. The Statute by Its Terms Reaches a Violation of IWC Zero Quotas

Packwood-Magnuson says that the Secretary of Commerce shall certify whaling which "diminishes the effectiveness" of the Convention.[4] The courts below gave this a plain and straightforward meaning. They held that Japan's defiance of the zero quotas established by the IWC "diminished the effectiveness" of the Convention.

There is hardly much room for argument that it does not. The IWC is the chosen instrument of tl. Convention. It is the body delegated by multinational agreement to implement the Convention's objectives. The IWC decided in 1982 to stop all sperm whaling in 1984 and all whaling of any species in 1986. Japan is continuing to kill thousands of whales in the face of these determinations. Petitioners can scarcely suggest that this defiance of the IWC's decisions enhances the prestige, strengthens the authority or adds to the reputation and weight of either the IWC or the Convention. Indeed, Japan's violation of the general moratorium flies in the face of the most thoroughly debated decision in the IWC's history. It would be difficult to imagine any ac-

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[4] Intervenor Petitioners' argument that Packwood-Magnuson constitutes an unconstitutional delegation of power to the IWC is, as their petition freely concedes, without judicial precedent. Int. Pet. at 22.

Nor is there any merit to Intervenor Petitioners' contention that Packwood-Magnuson, as applied below, would violate the Convention because the Convention gives them a right to object to whaling quotas. No provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas. Therefore, the case is indistinguishable from *Moser* v. *United States*, 341 U.S. 41, 45 (1951).

tion which more clearly "diminishes the effectiveness" of the international system.

Instead, Petitioners make what sounds like a more conventional plea. They seek the blank check of "executive discretion." They say that "diminish the effectiveness" has no ascertainable independent meaning, and so should be read as giving the Secretary unfettered freedom to apply it or not, as he may choose. What Petitioners want, in other words, is that the Secretary should be permitted to call black white and white black. He should be allowed solemnly to find, against the common sense of things, that an action—particularly this Japanese defiance of the Commission's historic decision to stop all commercial whale hunting now—had no impact on the Convention's effectiveness. Such an argument is unreasonable on its face.

B. The Legislative History Confirms that the Secretary Has No Discretion to Ignore Whaling in Excess of Commission Quotas

The legislative histories of Packwood-Magnuson, and its predecessor, the Pelly Amendment, confirm that Congress intended reduced fishing rights in the U.S. Fishery Conservation Zone to be an automatic, mandatory and non-discretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas. This was seen as the paradigm case of action that would "diminish the effectiveness" of the convention.

The Pelly Amendment was addressed, above all else, to the fact that several nations were intentionally ignoring high-seas fishing quotas established by international agreement—particularly those governing Atlantic salmon and whales. The wording of the statute permitted the Secretary to certify other practices as well, including many not contemplated by Congress, that might also "diminish the effectiveness" of the Convention. But the single point emphasized throughout the legislative history

is that the Pelly Amendment sanctions were created for the express purpose of penalizing nations that evaded overall limits on the catch or quotas. The House Committee Report stated, for example: "The Committee wished to be *absolutely certain* that the ICNAF ban on the taking of Atlantic Salmon now in force would qualify under the foregoing definition." H.R. Rep. No. 468, 92d Cong., 1st Sess. 8 (1971) (emphasis supplied). Indeed, when offending conduct took place, Congress made certification automatic.[5] And the representatives of the Departments of Commerce and State embraced this reading of the statute in 1971:

> "It was our intention in our modifications to the bill that if the majority of nations did accept a regulation or a ban on salmon fishing and that regulation applied to U.S. fishermen, and one of the nations in the convention or one of the nations not a member didn't agree with it, as far as trade with the United States was concerned, that *such trade restrictions would be applied to fishery products of that nation.*" [6] (Emphasis supplied.)

The Secretary of Commerce complied with this view of the statute from 1972 through 1978 in certifying five nations under the Pelly Amendment for intentionally ex-

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[5] The statute directs that the Secretary "shall certify" offending conduct. The legislative history consistently uses similar mandatory language. *E.g.*, H.R. Rep. No. 468, 92d Cong., 1st Sess. 6 (1971) ("Section 8(a) directs the Secretary of Commerce to certify"); 117 Cong. Rec. 34, 751 (1971) (statement of Rep. Dingell) ("the Secretary of Commerce would be required to certify"); 117 Cong. Rec. 47,053 (1971) (statement of Sen. Stevens) ("he must certify").

[6] *Atlantic Salmon: Hearings on H.R. 3304, H.R. 3305,* H.R. *3841, H.R. 4928, and H.R. 7242 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 92d Cong., 1st Sess. 394 (1971) (testimony of Donald L. McKernan, Special Assistant to the Secretary of State for Fisheries and Wildlife); *accord* H.R. Rep. No. 468, *supra,* at 10 (quoting a letter from the Department of Commerce to the House Committee on Merchant Marine and Fisheries).

ceeding IWC whaling quotas. In each case the certification was made despite the fact that the nation involved had already agreed to comply with the quotas the very next year.

In each case, the President decided not to impose import embargoes by pointing to the commitments of future compliance. And Congress balked. It concluded that automatic certification coupled with discretionary sanctions, however desirable the flexibility might seem to the State Department, simply would not serve Congress' objective of putting teeth into the multilateral conservation of the world's remaining whales. There was too much scope for Executive Branch backpeddling under pressure from a whaling nation. So in Packwood-Magnuson in 1979 it continued the automaticity of the certification and eliminated the discretion as to the penalty. The Packwood-Magnuson Amendment was adopted in direct response to the President's consistent refusal to impose any sanctions on the countries certified to be exceeding IWC whaling quotas. For better or for worse, Congress plainly meant to create a mandatory sanction for violating the internationally established IWC quotas that would not be subject to Executive Branch discretion to waive or avoid:

> "Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishing agreements. The major weakness has been that certification does not necessarily impose any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty.
>
> "In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification." 125 Cong. Rec. 22,083-84 (1979) (Statement of Rep. Oberstar).

By 1979 it was the common understanding of both political branches that, when violations of quotas were in-

volved, the certification provisions in Pelly imported no discretion. So Congress made no change in Pelly's certification standard of "diminish the effectiveness" when it wrote Packwood-Magnuson. Plainly Congress did not mean to import by the back door into Packwood-Magnuson's certification the very same discretion it intended to remove when it tightened up Pelly's sanctions provision.

Petitioners argue that the language of the statute could have been clearer. But there was nothing to clarify. Both the Congress and the Administration had the same understanding of the Pelly certification language—that it contained no hint of the discretion now sought. In considering Packwood-Magnuson, Congress sought and obtained assurance from the Department of Commerce that certification by the Secretary of IWC quota violations was mandatory and nondiscretionary:

> "Mr. McCLOSKEY. . . . But the *certification* step is a mandatory act under the law. It *is not a discretionary act.*
>
> "Mr. FRANK [Administrator of the National Oceanic and Atmospheric Administration.] *That is correct.*
>
> . . . .
>
> "Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing. But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas, . . . the second part is the optional authority that the President has.
>
> "Mr. FRANK. That is correct. *the first one is mandatory on the Secretary of Commerce.* The second is discretionary on the part of the President." *Whaling Policy and International Whaling Commission Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the En-*

> *vironment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 322-23 (1979) ("*1979 Oversight Hearings*") (J.A. 203-04). (Emphasis supplied.)

Administrator Frank's testimony in 1979 consistently contrasted violation of nonbinding resolutions, on the one hand, with intentional exceeding of IWC quotas, to which "it is clear that the Pelly amendment would apply":

> "Mr. FRANK. We have used the Pelly amendment most recently in connection with Peru, Chile, and South Korea. They were the most flagrant violators because they were taking whales without regard to IWC quotas.
>
> . . . .
>
> "IWC resolutions are not binding. If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply. I think it is a more difficult question if a country is violating something that is a recommendation but not binding." *1979 Oversight Hearings* 311-12 (J.A. 200-201).

Petitioners' analysis of the legislative history relies on oblique quotations of Representative Breaux that refer to the discretion of the Secretary in making certification decisions—quotations that in fact refer to his discretion to certify *other* activities, in addition to intentional contravention of whaling quotas, that might also diminish the effectiveness of the Convention. Representative Breaux fully understood, as did the entire Congress, the interpretation of the Department of Commerce in 1979 that certification is mandatory if a nation intentionally contravenes IWC whaling quotas:

> "Apparently Dick Frank is saying that the *taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify* that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the

> importation of whale meat." *1979 Oversight Hearings* at 359 (statement of Rep. Breaux) (emphasis supplied).

And there was no doubt in Senator Packwood's mind when he explained his amendment on the Senate floor:

> "[I]f any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately, not having to wait until their permit can be renewed, lose 50 percent of their allocation for fishing within our 200-mile zone." 125 Cong. Rec. 21,743 (1979).

Petitioners argue that all of the direct legislative history explaining the intended application of Pelly and Packwood-Magnuson to enforce the Whaling Convention should be ignored in deference to a single 1978 House committee report statement concerning a different statute on endangered species. But the legislative histories of Pelly and Packwood-Magnuson leave no question that Congress understood that intentional whaling in contravention of IWC quotas necessarily "diminishes the effectiveness" of the IWC and the Convention. That intent is not overcome by a House Committee statement a year earlier concerning legislation pertaining to treaties having nothing to do with setting marine resource quotas.[7] Respondents have maintained from the outset that the Secretary has the responsibility of determining whether *other* conduct—such as the use of certain types of harpoons or practices relating to record keeping—diminishes the effectiveness of the Convention. He lacks discretion, however, with respect to intentional contravention of whaling quotas—the overriding evil that

---

[7] Likewise, although the court of appeals was clearly correct in its analysis of the legislative history of the Tuna Convention Act of 1950 (as amended) (App. 26a-29a), the specific intent of Congress in enacting the Pelly and Packwood-Magnuson Amendments is so clear as to obviate any need to look to secondary evidence of probable intent such as use of similar language in other statutes.

the Packwood-Magnuson Amendment was intended to penalize.[8]

C. The Argument for Executive Discretion Was Expressly Rejected by Congress

Federal Petitioners implore that the Executive Branch must be able to apply "its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW"; they entreat that "[a] strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts." Fed. Pet. at 20-21. We might suggest that there will be quite enough international disharmony from the U.S.-Japanese flouting of the zero quotas set by the vote of over three-quarters of the member nations of the Convention. Instead, we refer only to the fact that these are the same arguments the Federal Petitioners made unsuccessfully to Congress in 1979. In contrast to its view now, the State Department argued at the time, in support of its proposal to change the bill and introduce more flexibility, that:

> "[Packwood-Magnuson] appears to provide *little flexibility or discretion* in its implementation.
>
> . . . .
>
> "[W]hat the Packwood amendment does is perhaps go a bit too far in *tying the administration's hands in its ability to deal with these problems on a diplomatic basis.*" *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environ-*

---

[8] Nor does the holding of the court of appeals, even if it were to govern other statutes, which it does not pretend to do, threaten the dire international consequences hypothesized by Federal Petitioners. Fed. Pet. at 21-22. Even if the Pelly and Packwood-Magnuson legislative history controlled the *certification* process under the endangered wildlife amendment, the latter provision contains no mandatory sanctions but gives the President total discretion to withhold sanctions.

> *ment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 313, 323 (1979) (J.A. 209, 218) (statements of John Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs) (emphasis supplied).

The Commerce Department argued: "[Packwood-Magnuson] should be modified to allow some flexibility to respond proportionately to the nature and scope of the particular offense." *Id.* at 314 (J.A. 210) (statement of Eldon V.C. Greenberg, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce).

The State Department specifically proposed creating a delayed compliance period prior to sanction:

> "Mr. NEGROPONTE. I think if we could decouple the certification process from the process of actually reducing allocations so that once there has been a certification, there is time then to go to Japan or any other country and say, look, this step has been taken. Do you realize if you don't do anything to remedy the situation which caused it, that next year we will be forced to reduce your allocations?" *Id.* at 325 (J.A. 220).

Congress not only rejected these arguments. It even revised Packwood-Magnuson after this testimony to provide for *immediate* partial suspension of fishing quotas under permits already issued rather than only a prohibition on issuing new permits after a certification. Congress explicitly opted for a "sanctions first; negotiation later" process—just the opposite of the State Department proposal. So much for Executive Branch discretion.

Thus, as enacted, Packwood-Magnuson requires immediate suspension of at least 50 percent of any issued fishing quota, but provides for reinstatement of the suspended quota if negotiations bring the offending nation into compliance with IWC policy within a 365-day "re-

medial period."[9] If the nation remains in noncompliance after one year, the temporary suspension becomes permanent, the remainder of the quota is forfeited and future allocations to that country are barred. 16 U.S.C. § 1821(e)(2)(D). Neither the statute nor the legislative history can be read to permit the Secretary to ignore these statutory requirements and create his own four-year "remedial period"—as the Baldrige-Murazumi correspondence purports to do.

D. The Secretary Has Consistently Recognized the Mandatory Requirement to Certify Intentional Contravention of Whaling Quotas

Federal Petitioners' principal claim that the Secretary may ignore a wholesale quota violation fell on deaf ears in the courts below, not only because the Baldrige-Murazumi correspondence violates the intent of Congress, but because it is also quite out of harmony with past administrative practice. As Judge Richey correctly concluded: "The Executive Branch, prior to enactment of the Pelly Amendment in 1971, and until as recently as July 24, 1984, consistently has taken the position that intentional fishing in excess of duly established international quotas necessarily 'diminishes the effectiveness' of the applicable fisheries conservation program." (App. 73a.) In every one of the five certifications that were issued from 1972 through 1978, the offending country had committed *prior to the certification* to come into compliance with IWC quotas the very next year (J.A. 171, 177-78). Yet in each case the Secretary certified the country as having "diminished the effectiveness" of the IWC whale conservation program.

---

[9] It is nonsense to argue, as Intervenor Petitioners do, that the order of the district court in this case would impose punitive sanctions for *past* conduct undertaken in reliance on the Baldrige-Murazumi correspondence. Int. Pet. at 13. Japan can avoid *any* impact of certification at any time simply by terminating its commercial whaling.

It is no answer to hypothesize, as do federal petitioners (Fed. Pet. at 21 n.5) that discretion may be warranted in situations involving aboriginal subsistence whaling. Indeed, in *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978), the government was faced with just such a situation involving the subsistence hunt of bowhead whales by Alaskan Eskimos and confirmed its longstanding interpretation that the effectiveness of the Convention demanded the scrupulous adherence to IWC quotas. In that case, the IWC had established a "zero" quota for the taking of bowhead whales by Alaskan Eskimos. When the United States decided not to object to the quota, and thereby claim an exemption under the Convention, the Alaskan Eskimos immediately sued to compel the filing of an exemption. The Executive Branch contended that such a one-time objection, even if later withdrawn, would devastate the international regulation of whaling. Affidavits from representatives of the Department of Commerce and Department of State averred that any U.S. approval of whaling in contravention of IWC quotas "would seriously weaken the effectiveness of the International Whaling Commission" (J.A. 139), "could result in the breakdown of the IWC" (J.A. 154), and would cause "the *almost certain collapse of the IWC as an effective mechanism for whale conservation*" (J.A. 158).

Nor can Federal Petitioners' contentions be reconciled with assurances given to Congress by the Secretary of Commerce as recently as July 24, 1984. In late June of 1984, Senator Packwood wrote to the Secretary to seek assurances that any nation continuing whaling despite the IWC moratorium would be certified under Packwood-Magnuson. Secretary Baldrige responded in the strongest possible affirmative terms:

> "You noted in your letter the widespread view that *any continued whaling* after the International Whaling Commission (IWC) moratorium decision takes effect *would be subject to certification. I agree*, since any such whaling attributable to the policies of a

foreign government *would clearly diminish the effectiveness of the IWC.*" Letter from Secretary of Commerce to Senator Packwood (July 24, 1984) (J.A. 198) (emphasis supplied).

E. The Secretary Has No Authority to Ignore the Law, Nor Must the Courts Stay Their Hand, Merely Because Foreign Relations May Be Affected

As a final finger on the scale, Federal Petitioners invoke the Court's reference in *Regan* v. *Wald*, 104 S. Ct. 3026, 3039 (1984), to the judiciary's " 'classical deference to the political branches [*sic*] in matters of foreign policy.' " Fed. Pet. at 19. The implication is that courts should accept the Executive's reading of a statute whenever the statute affects international relations even if that reading is incompatible with Congress' intent and offends the common sense meaning of the words of the statute.

This case admittedly affects international affairs. Congress chose to condition access to U.S. territorial fishing on strict compliance with the quotas of the International Whaling Commission. It cast its lot with a multilateral system for protecting what remains of the world's populations of these great creatures. In this case the Secretary of Commerce substituted his own judgment for the IWC's. He would replace a multilateral with a bilateral regulatory system.

Federal Petitioners contend that it is better that way —that by ignoring the IWC's zero quota and substituting the Secretary's judgment, many advantages follow. Indeed, so important is it that Washington's rule-making replace the IWC's that Federal Petitioners contend the Secretary should even be allowed to refuse "certification of countries that depart from IWC requirements that the United States itself considers unreasonable." *Ibid.*

Congress chose otherwise. It considered the plea of the Executive Branch for freedom and discretion; it heard the arguments that the nation's foreign policy might be affected if it backed the multilateral system. But it had had enough of the Pelly Amendment scheme which gave the Executive the freedom to decide whether to sanction a defiance of whaling quotas or not. It wanted no more Executive discretion.

Of course the Executive Branch prefers the freedom to maneuver. Of course it would like to balance the interest of whale conservation against other aspects of our relations with Japan. Of course it would prefer not to be required to penalize that country when it offends the IWC's quotas. But the issue has been decided otherwise. Congress tied foreign fishing in U.S. territorial seas to a multilateral, not a bilateral, whale conservation system. This was within Congress' power; it was establishing one of many terms to its grant to foreign nations of the privilege of fishing in American waters. And the interpretation and application of that statutory standard is properly judicial, though foreign policy interests may be engaged.

There is nothing in *Regan* v. *Wald*, or any other decision of this Court, that suggests the judiciary should relinquish to the Executive its constitutional obligation to say what the law is, merely because there may be consequences beyond our borders. Indeed, both the majority and dissenting opinions in *Regan* v. *Wald* demonstrate the careful scrutiny of the legislative record which the courts are obligated to undertake to determine whether Executive action is consistent with Legislative will.

Regan v. *Wald* also answers Intervenor Petitioners' suggestion that this case is nonjusticiable because it touches on foreign affairs. If such a doctrine existed, *Regan* v. *Wald* would have been the appropriate opportu-

nity for its application. The Fishery Conservation Zone, rights to fish within that Zone and conditions on those fishing rights, all were created by Congress through duly enacted legislation. It was by statute, not the President's inherent powers in that "vast external realm," which placed ministerial responsibilities for carrying out the legislative scheme in the Executive Branch. The justiciability of the execution by the Executive Branch of the laws of the United States has been beyond question since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

The doctrine of this Court that properly guided the courts below was repeated most recently by Justice Rehnquist on behalf of the Court in *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981): "when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Quoting Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 637-38 (Jackson, J., concurring). Justice Frankfurter, in his concurring opinion in *Youngstown* stated the point this way, and in terms that seemed to suggest he had something like this very case in mind:

> "It is quite impossible, however, when Congress did specifically address itself to a problem, . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." 343 U.S. at 609.

II. THE COURT OF APPEALS PROPERLY REFUSED TO DISTURB THE EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT

Petitioners' argument that the district court abused its discretion and offended equity in ordering the Executive Branch to carry out Packwood-Magnuson—that statutory integrity should be sacrificed to "Executive Branch credibility"—is as dangerous as it is novel. It would rule out mandamus in any matter touching foreign affairs, and give the Executive Branch a free hand and an incentive to make agreements to do whatever it wanted to do, whatever the law might say. An international promise would then bootstrap the Executive out of any statutory constraint.

Moreover, there are no equitable circumstances here in favor of petitioners. They were on full notice. Both the Intervenors and the Executive Branch participated in the legislative consideration of Packwood-Magnuson in 1979, testified at the hearings, opposed and sought modification of the legislation, and are well aware that their pleas for discretion were rejected.

The prospective filing of this particular challenge was announced at a public news conference on November 2, 1984—eleven days before the Baldrige-Murazumi exchange—and was widely publicized in the print and electronic media. The complaint was actually filed on November 8, 1984 (J.A. 3, 85), again before the November 13 agreement. On November 15, 1984, before Japan had taken any action in arguable reliance on the Secretary's letter, the Embassy of Japan was given a copy of the complaint and an accompanying letter explaining the illegality of the Secretary's action. Four days later, a copy of Respondents' November 19, 1984 petition to the Secretary to undertake certification of Japan (App. 67a) also was delivered to the Embassy of Japan. On December 11, 1984, still prior to any action by Japan, Respond-

ents filed their motion for summary judgment (J.A. 5) and delivered a copy of that document to the Embassy of Japan. This is a case in which Federal Petitioners, Intervenor Petitioners and the Government of Japan proceeded with full notice and knowledge that they were acting at their peril.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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Nos. 85-954, 85-955

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Pespondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

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QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas by which Japan is not bound because it filed formal objections to them, the Japanese nationals are diminishing the effectiveness of the international convention under which the quotas were established, even though Japan has agreed with the United States (a) to withdraw, irrevocably, its formal objections to the quotas, (b) to limit its harvest of whales to numbers that scientific evidence indicated to the Secretary's satisfaction would not endanger the species of whales in question, and (c) to cease commercial whaling operations in 1988, which is two years later than when quotas established under the international convention will reach zero for all species of whales.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute phrased generally and ambiguously when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose severe punitive sanctions on that nation and its nationals.

THE PARTIES

The petitioners named in the captions were defendant-intervenor and defendant and appellants below. In addition, Japan Fisheries Association and Secretary of State George P. Shultz were defendant-intervenor and defendant, respectively, and appellants below. The plaintiffs and appellees below, respondents in this Court, are, in addition to the American Cetacean Society, the Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center.

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IN THE

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On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, et al.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 768 F.2d

426 and appear in the separately printed appendix to the petition in No. 85-955 (1a-55a). The district court opinion is reported at 604 F. Supp. 1398 and also appears in the separately printed appendix to the petition in No. 85-955 (56a-84a).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Timely petitions for rehearing and suggestions that rehearing be held *en banc* were denied on October 11, 1985 (*id.* at 94a-99a). The petitions for certiorari were filed on December 4, 1985, and the writs were granted on January 13, 1986. This Court has jurisdiction under 28 U.S.C § 1254(1).

STATUTES AND TREATIES INVOLVED

The pertinent provisions of the International Convention for the Regulation of Whaling, the Pelly Amendment, and the Packwood-Magnuson Amendment appear in the Appendices, at 1a-8a. The Murazumi-Baldrige

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[1] The Court has granted leave to dispense with the filing of a joint appendix and has ordered that the separately printed appendix to the petition in No. 85-955 and the joint appendix submitted to the court below shall suffice in lieu thereof. The appendix to the petition in No. 85-955 is hereinafter cited as "Pet. App." The appendix attached to this brief is cited as "App."

Agreement and ancillary documents appear in Pet. App. 102a-119a.

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would place the United States in breach of an agreement with Japan. In that agreement, Japan made irrevocable concessions, satisfactory to the responsible United States Executive Branch official, intended to avoid precisely the punitive sanction that the court's order would force the Executive Branch to impose. This extraordinary exercise of judicial power arises out of a controversy over commercial whaling operations.

The Convention and Whale Quotas

The International Convention for the Regulation of Whaling (ICRW) was signed in 1946 and entered into force for the United States in 1948. It established a system of international regulation the purposes and objectives of which are "to protect all species of whales from further overfishing" with the recognition that "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales that may be captured

without endangering these natural resources." The ICRW was to be administered "without causing widespread economic and nutritional distress . . . and thus make possible the orderly development of the whaling industry." International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, Preamble (App. 1a-2a).

The International Whaling Commission (IWC), created by the ICRW, establishes and sets forth in its so-called "Schedule" such matters as annual whaling quotas, the whaling seasons, and regulations governing permissible whaling methods. All amendments to the Schedule including whaling quotas must, to be lawfully enacted, comply with Article V-2 of the ICRW. That Article requires, *inter alia*, (1) that the amendment be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) that the amendment "be based on scientific findings," and (3) that it "take into consideration the interests of the consumers of whale products and the whaling industry." (App. 2a.)

Under the terms of Article V-3 of the ICRW, any government that presents an objection to the IWC within 90 days of notification of the adoption of an amendment to the Schedule is exempt, and the amendment does not become effective as to the objecting

government. (App. 2a-3a.) The right to present an objection is absolute and unqualified.

In 1981, the IWC, in Footnote 1 to Table 3 of the Schedule, established a zero catch limit for the Western Division Stock of North Pacific Sperm Whales. The IWC adopted this amendment without satisfying the three requirements of Article V-2 of the ICRW. On November 1, 1981, Japan filed a timely objection to Footnote 1 of Table 3 pursuant to Article V-3 of the ICRW. Thereafter, the IWC reconsidered and agreed to allow a taking of 450 sperm whales in the 1982-83 coastal season and 400 sperm whales in the 1983-84 coastal season but did not establish a quota for the 1984-85 coastal season or for any period thereafter.[2] Japan thereupon announced its intent to take whales inasmuch as the filing of the timely objection enabled Japan to do so without being in violation of the ICRW.

In 1982, the IWC adopted an amendment that would impose a moratorium on all commercial whaling effective at the end of the 1984-85 coastal whaling season and the 1985 pelagic (high seas) whaling season. As in the case of the sperm whale quotas, the IWC adopted this amendment without satisfying the

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[2] The season for sperm whales, which are taken off coastal Japan, runs from August of each year through March of the following year.

three requirements of Article V-2 noted above.[3] Japan also filed a timely objection to this amendment pursuant to Article V-3 of the treaty.

The United States Statutes

Two United States statutes bear on this case. In 1971, Congress enacted the so-called Pelly Amendment to the Fishermen's Protective Act, which is Section 8(a) of that statute. 85 Stat. 768, 22 U.S.C. § 1978(a) (App. 4a-6a). Its operative provision reads:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which

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[3] In particular, the IWC failed to base its moratorium decision on scientific findings. As explained by the official observer of the United Nations Food and Agriculture Organization at the International Whaling Commission, 34th Session: "The continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure. Given the differing status of the various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium. A justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds, but these seem outside the terms of reference of the Commission."

> diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

Id. § 1978(a)(1). The President, upon receipt of certification by the Secretary of Commerce, is authorized by Section 8(a)(3) (App. 4a-5a) to direct the Secretary of the Treasury to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade.

In 1979, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, as Section 201(e)(2). 90 Stat. 337, 16 U.S.C. § 1821(e)(2) (App. 7a-8a). The Packwood-Magnuson Amendment deals specifically with whaling and with the ICRW. It provides for an automatic sanction, the reduction of at least 50 percent of a country's allocation of fish that it can harvest in the United States fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that diminishes the effectiveness of the ICRW.

Certifications under either the Pelly Amendment or the Packwood-Magnuson Amendment have been rare, and sanctions have been imposed only once. In the usual case, the possibility of United States certification and

sanction has led to negotiations between the United States and a country whose nationals are suspected of activity that diminishes the effectiveness of the ICRW (or some other ocean resources conservation program), and to the conclusion of an agreement that, in the view of the United States, furthers conservation objectives, eliminating the need for sanctions. That is what happened here.

The Murazumi-Baldrige Agreement

Prior to the beginning of the 1984-85 coastal whaling season, Japan entered into discussions with American officials in an attempt to resolve differences and avoid confrontation between the two nations on whaling issues. These discussions resulted in an exchange of letters between Yasushi Murazumi, Chargé d'Affaires *ad interim* of Japan, and Malcolm Baldrige, United States Secretary of Commerce, in which it was agreed that, if Japan withdrew its objection to the IWC's zero quota for sperm whales, then the Japanese could take up to 400 sperm whales in each of the 1984-85 and 1985-86 coastal seasons without being deemed to have "diminished the effectiveness" of the ICRW.

Secretary Baldrige stated by letter to Mr. Murazumi his conclusion that the limited amount of whaling in which Japan would be permitted to engage would not in fact diminish

the effectiveness of the ICRW conservation program:

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvest of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter [*i.e.*, 400 sperm whales in each of the 1984-85 and 1985-86 seasons] would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

(Pet. App. 107a.) The Secretary explained the basis for this conclusion (*id.* at 107a-08a):

> The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes.

On December 11, 1984, the Government of Japan, pursuant to its undertaking in the Murazumi-Baldrige Agreement, filed a withdrawal, effective April 1, 1988, of its objection to Footnote 1 to Table 3 of the IWC Schedule pertaining to sperm whales. This withdrawal, by the terms of the IWC, is irrevocable. (Pet. App. 4a.)

There is a second part of the Murazumi-Baldrige Agreement. It provides that, if Japan agrees to end all commercial whaling by April 1, 1988, by withdrawing its objection to the general IWC moratorium as of that date, then the Japanese may take no more than 200 sperm whales in each of the 1986-87 and 1987-88 coastal seasons and may take other species of whales subject to other limitations to be negotiated between the United States and Japan, without the imposition of Pelly or Packwood-Magnuson sanctions. (Pet. App. 106a.)

Japan has not withdrawn its objection to the general moratorium because of the district court's decision, which would order Secretary Baldrige to dishonor this Agreement. However, Japan has committed itself to withdraw the second objection if that order is overturned. (Pet. App. 116a-17a.) In that event, all commercial whaling by Japanese nationals will cease on April 1, 1988.

The Proceedings Below

This action was brought in November 1984 before agreement had been reached between the United States and Japan. The plaintiffs are twelve animal welfare and conservation organizations and a former United States deputy commissioner to the IWC. The defendants are Secretary of Commerce Baldrige and Secretary of State Shultz. These petitioners, the Japan Whaling Association and the Japan Fisheries Association, intervened as a matter of right on the side of the two United States Cabinet officers.

The district court, Judge Richey, heard the case on cross-motions for summary judgment after the Murazumi-Baldrige Agreement was concluded. Judge Richey granted the plaintiffs' motion. He held that the phrase "diminish the effectiveness" of the ICRW as used in the Pelly and Packwood-Magnuson Amendments means, in the context of this case, any taking of whales in excess of an ICRW quota. In Judge Richey's view, the statutes preclude the exercise of judgment by the Secretary of Commerce; he must certify whenever nationals of a country have exceeded an ICRW quota, whatever the circumstances. The district court's judgment therefore directed the Secretary of Commerce to make a certification, in violation of the agreement that the Secretary himself had concluded with the Government of Japan, that would result in the automatic imposition of the

Packwood-Magnuson sanction on Japan and its fishing industry.

The court of appeals stayed the district court's judgment and heard the appeal on an expedited basis. It affirmed, agreeing with "the District Court's ultimate conclusion that certification in this case is mandatory, though . . . for slightly different reasons." On the basis of statements made during the course of congressional consideration of the Pelly and Packwood-Magnuson Amendments, the court of appeals held that, "although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas." (Pet. App. 3a.) Judge Wright's opinion to this effect was joined by the late Judge Tamm.

District Judge Oberdorfer, sitting by designation, dissented. He said that he could not agree that, "in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it." (*Id.* at 45a.) He also expressed his doubt that the case, which resulted in "add[ing] the Judicial Branch's voice to this delicate process" of conducting foreign affairs (*id.* at 50a), was justiciable; he said further that, even granting justiciability, the equities

required that the court abstain from exercising its powers in this situation.

Petitions for rehearing with suggestions for rehearing *en banc* were filed. Four of the seven active circuit judges who considered the *en banc* suggestions stated their "substantial agreement with the views expressed in Judge Oberdorfer's dissent" and would have granted the requested *en banc* rehearing. (Pet. App. 95a, 99a.) Two active circuit judges did not participate. Rehearing *en banc* therefore was denied for want of the majority of all the circuit judges in regular active service, including non-participants, that the court below requires in applying Fed. R. App. P. 35(a).

Interim Whaling By Japan

Members of the petitioner Japan Whaling Association, operating under licenses granted by their government, took the number of sperm whales allowed by the Murazumi-Baldrige Agreement in the 1984-85 coastal season. They are whaling again during the current 1985-86 season, which will end in April. Again, as in the first season, there have been no violations or even allegations that Japanese whalers have exceeded the permissible take of 400 sperm whales. If the judgment below is reversed, Japan Whaling Association members will take only 200 sperm whales in each of the following two coastal seasons, and all commercial

Japanese whaling will cease at the end of the second such season, on April 1, 1988.

SUMMARY OF ARGUMENT

I.

The language of the Pelly and Packwood-Magnuson Amendments, calling for a determination by the Secretary of Commerce whether certain conduct by foreign fishermen or whalers diminishes the effectiveness of an international fisheries conservation program, is plainly discretionary language, requiring the Secretary to exercise his informed judgment. Had Congress wished to impose upon him the duty of certifying any taking of fish or whales in excess of an international quota, it would have used quite different language.

The judgmental purport of the language is confirmed by the legislative history of the two statutes, a point that will be fully developed in the brief for the federal petitioners. Among the key items of the legislative history are (1) the understanding manifested in 1978, when the Packwood-Magnuson Amendment was enacted, by two key participants in the legislative process -- the chairman of the pertinent House subcommittee and the President -- that, under the existing Pelly Amendment and the new provision, certification was not mandatory for any and all violations of quotas but was

discretionary; and (2) the same understanding manifested in 1984 by the surviving author of the Packwood-Magnuson Amendment when he proposed a further amendment that would clearly have made certification and sanctions obligatory when a quota was exceeded.

Even if there were a serious question whether Congress intended to delegate authority to the Secretary of Commerce to exercise judgment with respect to certification under the Pelly and Packwood-Magnuson Amendments, he himself has so construed his authority. That construction by the responsible administrator of the statute is reasonable, and it must therefore be respected by a reviewing court. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

To read the two statutes as requiring the Secretary of Commerce to certify a foreign nation in every case in which an international fisheries quota is exceeded is to raise unnecessarily a serious constitutional question -- the question whether sovereign power of the United States has been unlawfully delegated to an international body. the International Whaling Commission. The improper delegation objection is avoided only if the statutes are read as providing for the intervention of an exercise of judgment on the part of a United States official before sanctions are imposed to enforce such a body's decision.

II.

A long-standing rule of statutory construction, reiterated and applied by this Court two years ago in *Trans World Airlines* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984), requires that Congress express itself clearly and unambiguously if it is to be deemed to have abrogated or modified an existing treaty. In this case the relevant treaty, the ICRW, expressly provides in Article V-3 that a nation may exempt itself from a quota established by the IWC. If the United States imposes sanctions on such a nation for exceeding a quota that by the terms of the Convention is not applicable to it, the result is the unilateral modification or abrogation by the United States of a right under a treaty to which it subscribes. The language of the Pelly and Packwood-Magnuson Amendments does not express clearly and unambiguously an intent to reach a nation that, by filing an objection, has made a whaling (or other) quota inapplicable to it. The history of the Amendments does not reflect any intent on the part of Congress to abrogate or modify the ICRW or other fishery treaties.

Application of the Pelly and Packwood-Magnuson Amendments to a nation that has filed an objection and thus exempted itself from an international fishery quota would place the United States in violation of international law. The Convention does not, explicitly or implicitly,

allow such an application of sanctions, and the coercion of a treaty signatory to forgo a treaty right is condemned by principles of international law. Moreover, it runs counter to the policy of the United States, which is to insist upon escape valves such as Article V-3 of the ICRW.

III.

The case is not justiciable. It is not within the judicial power of a United States court to command an Executive Branch official to dishonor an international agreement, as the United States would be here required to dishonor the Murazumi-Baldrige Agreement. Under the test of justiciability stated in *Baker v. Carr*, 369 U.S. 196, 217 (1962), the courts below have should have considered the consequences of judicial action, including "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The nation is embarrassed by having to dishonor its word, by having to do so at the expense of foreign nationals who have acted in reliance on its word, and by so behaving that its word is regarded skeptically by all other nations.

Even if the case is justiciable, traditional equitable considerations demanded that the courts below stay their hands. An injunction is an equitable remedy that should be withheld

where the equities so warrant. The same thing is true if the order below is regarded as in the nature of mandamus. Here the equities weigh strongly in favor of the Secretary of Commerce and these intervening Japanese petitioners, on whom the judicially mandated sanctions would fall. The overriding equitable consideration is that the order of the courts below would have the United States repudiate an agreement on which these petitioners have relied and impose a sanction in retribution for the very conduct in which they engaged in good faith on the strength of the word of the United States.

ARGUMENT

The federal defendants will develop the arguments that:

> (1) on its face, the language of the Pelly and Packwood-Magnuson Amendments -- "diminish the effectiveness" -- calls for the exercise of judgment by the Secretary of Commerce in making his decision whether activities of foreign nationals in fact diminish the effectiveness of an international fishery conservation program, and particularly the International Convention for the Regulation of Whaling;

(2) the legislative history does not compel (or even seriously suggest) a reading of the statutes that departs from their plainly judgmental terms and instead imposes on a Cabinet officer acting in the delicate, shifting arena of international relations a ministerial duty to punish another nation; and

(3) in any event, the Secretary's reading of the statutes as calling for the exercise of his judgment is a reasonable, if not required, reading, and is therefore entitled to judicial deference -- greater deference than usual for the very reason that the statutes deal here with foreign relations.

Petitioners Japan Whaling Association and Japan Fisheries Association endorse those arguments fully. In Part I, petitioners state summarily the argument that will be fully developed in the government's companion brief, emphasizing certain aspects of the legislative history, and intending not to duplicate the government's brief. Also in Part I, these petitioners urge that a serious constitutional question of unlawful delegation is raised if the statutes are read as making the Secretary of Commerce a mere instrument for enforcing decisions of the International Whaling Commission.

Japan Whaling Association and Japan Fisheries Association, representatives of the Japanese citizens whose good faith whaling brought on the judicially mandated sanctions that the Court is considering and who would be immediately affected by the imposition of those sanctions, argue in this brief -- with the approbation of their government -- that the statutes do not require the imposition of the sanctions for a more fundamental reason: Under the ICRW itself and therefore at international law, Japan, having filed objections to the IWC quotas in question, is exempt from those quotas and legally free to ignore them.

Domestic United States statutes should not and indeed cannot, consonantly with international law, be construed as providing for the mandatory imposition of sanctions against a nation that has done no wrong in the eyes of its treaty partners (which include the United States) or in the eyes of the international community more generally. That argument is developed in Part II hereunder.

In Part III, these petitioners urge that the subject matter of the suit is such that it should not have been entertained and that, in any event, no United States court can or properly should enter the order that has been entered in this case. Limitations on judicial power and considerations of equity counsel against any judicial order compelling a high official to act in

breach of an international agreement that he has concluded with a friendly nation, on which that nation and its citizens have relied in good faith, and to impose upon the friendly nation for that very reliance the precise penalty that both parties intended the agreement to avoid.

I. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS DO NOT REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY AUTOMATICALLY ANY NATION WHOSE CITIZENS TAKE WHALES IN EXCESS OF AN IWC QUOTA.

The Secretary of Commerce concluded on the basis of his study of the scientific data, prior actions of the IWC, consultation with the United States Commissioner to the IWC, and the Japanese undertaking in the Murazumi-Baldrige Agreement that the taking by Japan of the limited number of whales allowed by the Agreement before Japanese commercial whaling was phased out would not diminish the effectiveness of the ICRW. That is plainly an allowable judgment under the terms of the governing statutes.

A. The Plain Meaning Of The Statutory Language Grants Discretion To The Secretary Whether To Certify.

On their face, the Pelly and Packwood-Magnuson Amendments authorize the

Secretary of Commerce to exercise discretion in determining whether to certify a nation for its whaling activities. The critical language in the Pelly Amendment, mirrored in the Packwood-Magnuson Amendment, directs the Secretary to certify a nation when he "determines that [its nationals], directly or indirectly, are conducting fishing operations . . . which diminish the effectiveness" of an international fishing conservation program. (App. 4a. *Cf. id.* at 7a.) Congress did not command the Secretary to certify any nation whose nationals take whales in excess of an IWC quota. Had that been its intent, it would have used language very different from language directing the Secretary to make the plainly judgmental determination whether conduct diminishes the effectiveness of a conservation agreement.

Such a determination requires an analysis of the fishing or whaling operations and the international conservation program in question; it also demands the application of the expertise of the Secretary and his subordinates, who are uniquely qualified to analyze the effect of such operations on the international program. A determination whether conduct diminishes the effectiveness of a multilateral treaty is no mere ministerial act. It calls, instead, for careful evaluation and ultimate resolution by a high-ranking Cabinet official of matters of great importance to United States conservation and foreign policy. In short, the plain meaning of

the statutes is to authorize the Secretary to exercise discretion.

B. The Legislative History Confirms That The Secretary Has Discretion Under The Statutes.

The legislative history of both the Pelly and Packwood-Magnuson Amendments confirms that the Secretary is meant to exercise his judgment in determining whether a nation has acted so as to diminish the effectiveness of the ICRW. Petitioners leave to the Solicitor General a full analysis of the legislative history and the lower courts' misapprehension of it. Petitioners invite the Court's attention to two points that merit particular attention.

First, statements made at the time of enactment of the Packwood-Magnuson Amendment in 1979, by a responsible legislator and by the final actor in the legislative process, the President, demonstrate that, under both Packwood-Magnuson and the earlier Pelly Amendment, the Secretary's determination whether a nation's actions diminish the effectiveness of the ICRW was understood to be a discretionary determination.

The effect of the Packwood-Magnuson Amendment was to make the imposition of sanctions mandatory when a nation is certified

for diminishing the effectiveness of the ICRW. Under the Pelly Amendment, the imposition of sanctions had been discretionary (and continues to be for other conservation programs).

Congressman Breaux, chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the House Merchant Marine and Fisheries Committee, carefully explained the change and made clear in doing so that under both Amendments the Secretary's original decision whether to certify was discretionary. He stated his understanding that "under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration." *Hearings Before the Subcommittee on Fisheries and Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 314-15 (1979) [hereinafter cited as *Hearings*]. These, he continued, were:

> First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification [,] and, second, after a nation is certified there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we

> have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them in the first category which is the certification of a nation being in violation of an international agreement.

The court of appeals dismissed what Congressman Breaux said, characterizing it as "ambiguous." (Pet. App. 36a n.20.) In reality, this statement is not in the least ambiguous. Congressman Breaux clearly stated, *Hearings*, *supra*, at 317, that "[t]he Secretary has the discretion in making a certification decision."

President Carter reiterated Congressman Breaux's point when he signed the Packwood-Magnuson Amendment into law. He said:

> With regard to both the Packwood-Magnuson and Pelly Amendments the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.[4]

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[4] Presidential Signing Statement, 15 Weekly Comp. Pres. Doc. 1435 (Aug. 15, 1979).

Second, Senator Packwood, one of the sponsors of the Packwood-Magnuson Amendment, made clear his understanding of the Secretary's discretionary role when he introduced in 1984 a further amendment to the Magnuson Fishery Conservation and Management Act. His amendment would have eliminated any occasion for a judgmental determination by the Secretary of Commerce. His proposal was to "deem to be certified" for the purposes of the Packwood-Magnuson Amendment "[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission." (App. 9a.) Had Senator Packwood believed that the 1979 amendment he authored already required certification of a country whose nationals were exceeding IWC quotas, he would not have proposed that further amendment. His amendment was defeated in a House-Senate Conference Committee. *See* Letter from Congressman Dante B. Fascell, Chairman of House Committee on Foreign Affairs, to Congressman Mervyn M. Dymally (Sept. 6, 1984) (App. 11a).

C. Deference Is Owing To The Secretary's Reasonable Construction Of The Statutes He Administers.

Apart from all else, the Secretary of Commerce in this case, and on prior occasions, has consistently construed the Pelly and Packwood-Magnuson Amendments as calling for a judgment on his part whether particular fishing or whaling activity diminishes the effectiveness of the ICRW or some other international fishing convention. His interpretation of the statutes is clearly correct, based on their language and their history, and is at the very least reasonable. It therefore commands the deference of a reviewing court under familiar principles that this Court has emphasized again and again in the last several terms. *See, e.g., Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2782 & n.9 (1984). *See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1112 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

D. An Interpretation Of The Statutes As Imposing On The Secretary A Ministerial Duty To Certify Any Taking In Excess Of IWC Quotas Unnecessarily Raises A Serious Constitutional Question Concerning Unlawful Delegation Of Power.

The court below interpreted the Pelly and Packwood-Magnuson provisions as manifesting a congressional intent "to provide enforcement leverage" to the IWC. The court's opinion candidly admits that, under the terms of this IWC enforcement machinery, "[d]iscretion is vested in the international body rather than in the member nations," *i.e.*, discretion is vested in the IWC rather than in the Executive Branch of the United States Government. (Pet. App. 40a.) According to this interpretation, whenever the IWC exercises its discretion and, for example, adopts a zero quota or a moratorium, the Secretary of Commerce lacks any discretion and must certify a nation once he finds that nationals of that country have taken a single whale. Upon such certification the Secretary of State must automatically impose the Packwood-Magnuson sanction.

This interpretation of the Pelly and Packwood-Magnuson Amendments raises a serious question whether Congress has

authority under the Constitution to fashion a system in which the Secretaries of Commerce and State become the enforcement arm of the IWC.

Congress has never attempted forthrightly to delegate Executive Branch power to an international organization. Consequently, there are no judicial decisions that have directly ruled on the question whether Congress has power to subject the Executive Branch to the will of an entity such as the IWC to enforce its legislation. This Court long ago indicated, however, in *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), that Congress has no such power:

> [The powers of government] cannot be granted away or restrained on behalf of anyone. [They] are delegated in trust to the United States, and are incapable of transfer to other parties. They cannot be abandoned or surrendered.

From the delegation cases of the 1930s we know that there are limits on the power of Congress to delegate legislative powers to executive agencies, state agencies, and private industrial groups. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

And we know that the doctrine of those cases is alive, cautioning against any open-ended construction of statutes conferring powers on executive agencies. Three Justices recently joined in a prevailing opinion that warned against statutory interpretations that "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). A concurring Justice thought the statute unconstitutional as a standardless delegation of power. *Id.* at 671-88 (concurring opinion of Rehnquist, J.).

The construction of Pelly and Packwood-Magnuson that results in the conferral of all discretionary authority upon the IWC, leaving United States officials as mere enforcers of decisions reached by another body, presents an *a fortiori* case of unconstitutional delegation.

One of the fundamental objections to overbroad delegation is that it vests power in the hands of persons or entities that are not accountable, as Congress is, to the electorate of the United States. In the decided cases, the delegate was at least a domestic United States entity, *i.e.*, an organization approved by the

President or a state or federal agency. In the instant case, the delegate would be the IWC, an international organization, that is in no way accountable to the American electorate.

Second, in *Panama Refining* and *Schechter*, the President retained discretion to approve or modify the acts of the delegate. In the instant case the authority that would be delegated to the IWC is the Executive Branch power to exercise discretion to determine when it is lawful to issue certification and thereby impose the Packwood-Magnuson sanction. The Executive Branch would be deprived of all discretion. The discretion would be vested in the IWC.

Finally, another fundamental policy objection to overbroad delegation is the potential for abuse of the lawmaking and enforcement process. In the instant case the amendments establishing the moratorium and zero quota were enacted without compliance with Article V-2 of the ICRW, which establishes prerequisites to the adoption of quotas by the IWC, yet the court below would have the Executive Branch enforce these amendments as a ministerial duty.

This Court has repeatedly held that courts must adopt statutory interpretations which "avoid constitutional problems." *National Cable Television Association v. United States*, 415 U.S. 336, 342 (1974). As Justice

Brandeis stated in his famous concurring opinion in *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.

Here the constitutional construction of the Pelly and Packwood-Magnuson Amendments is not just "fairly possible." It is commanded by text, history, and principles of deference. The constitutional doubt -- a serious doubt -- therefore is easily avoided.

II. THE STATUTES SHOULD NOT BE READ AS REQUIRING THE IMPOSITION OF SANCTIONS AGAINST A NATION THAT HAS EXEMPTED ITSELF FROM THE INTERNATIONAL REQUIREMENT THAT THE SANCTIONS ARE INTENDED TO ENFORCE.

A. An Interpretation Of The Statutes As Applying To A Party That Has Exempted Itself From An IWC Quota Improperly And Unnecessarily Creates A Conflict Between The Statutes And The ICRW.

This Court has held repeatedly that federal domestic legislation enacted subsequent to the conclusion of a treaty to which the United States is a party must be construed in a fashion consistent with the treaty provisions unless Congress *expressly* repeals or modifies the treaty provision. The most recent statement of this rule came two years ago:

> There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Trans World Airlines v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (citation omitted). A century earlier, the Court had said much the same thing: "[T]he court ought, if possible, to adopt that construction which recognized and saved rights secured by the Treaty." *Chew Heong* v. *United States*, 112

U.S. 536, 549 (1884). *See also Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress").

Section 134 of the most recent version of the Restatement of Foreign Relations Law (Tentative Draft No. 6, 1985), codifies these decisions: "A United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."

Article V-3 of the ICRW allows a signatory nation to object to an IWC quota and render that quota inapplicable to it. A nation that has properly objected is free under the Convention and under generally recognized principles of international law to ignore the IWC quota to which it has objected. As a party to the ICRW, the United States is bound by Article V-3 as much as by any other provision of the Convention. Indeed, the United States has been at the forefront of the nations that have insisted upon escape valves such as Article V-3 as a condition of signing multilateral conventions (*see* Part II.C., *infra*).

If the Pelly and Packwood-Magnuson Amendments are construed as applicable to a nation that has filed Article V-3 objections -- as calling for the imposition of sanctions on such a nation because it has exceeded a quota from

which it is exempt -- then those statutes are inconsistent with Article V-3 and indeed abrogate the treaty right that is stated in Article V-3. In the absence of much more explicit language, the Pelly and Packwood-Magnuson Amendments cannot be so construed.

Indeed, Congress clearly intended the Amendments to authorize certification only when a nation has violated the ICRW by failing to enforce lawfully binding quotas upon their nationals. Literally every Congressman who addressed the subject clearly indicated that only violations, flagrant violations, or flouting of the Convention could be regarded as conduct that diminishes the effectiveness of the Convention.[5] A nation that has exempted itself under Article V-3 is not lawfully bound by the relevant quota, is not in violation of the ICRW, and cannot be certified under the Amendments.

Petitioners make this argument with full knowledge that the Pelly Amendment was born of the need felt by Congress to do something about salmon fishing by Danish nationals at a time when Denmark had objected to a salmon

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[5] For example, Congressman Pelly's own definition of conduct that "diminishes the effectiveness" of the treaty was a "case of *flagrant violations* of any international fishery conservation program to which the United States has committed itself." 117 Cong. Rec. 34752 (1971) (emphasis added). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Packwood); *id.* (statement of Sen. Magnuson); *id.* at 22082-83 (1979) (statement of Cong. Murphy).

quota under a provision comparable to Article V-3. Congress, to be sure, acted with the Danish fishermen in mind. But it acted without a hint anywhere in the legislative history of the Pelly Amendment (or of the Packwood-Magnuson Amendment for that matter) that it meant to act inconsistently with United States treaty undertakings. The want of any expressed intent so to act -- the want of any expressed intent to abrogate Article V-3 and comparable provisions of other fisheries conventions -- requires that, despite their genesis, the statutes be read as not applying to a nation that has exercised its Article V-3 rights.

B. The Imposition Of Sanctions Against Japan Would Result In Violation Of International Law.

It is not only the rule of construction that has come down from *Chew Heong* and was so lately restated in the *Trans World Airlines* case that condemns any application of the Pelly and Packwood-Magnuson Amendments to a nation that has exempted itself from an ICRW quota. Any such application also results in violation of international law.

The court below believed that the use of Pelly and Packwood-Magnuson sanctions as "enforcement leverage," to coerce signatory nations not to exercise their unqualified right to object and become exempt from unacceptable

IWC action, does not violate international law. The court did not support this conclusion with either analysis or judicial authority. It merely stated that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations, even when those regulations are not binding on the member . . . under the terms of the Convention itself." (Pet. App. 5a n.1.) The Solicitor General makes the same argument.

The "coercion" thesis advanced by both the court below and the Solicitor General is inherently fallacious. It would vitiate the concept of treaty-making if signatories were free to coerce fellow signatories to abstain from the exercise of unqualified treaty rights by the threat of sanctions authorized by domestic legislation unless the treaty itself forbade the use of such coercion. This Court has consistently held that treaties must be interpreted in a spirit of *uberrima fides*, *i.e.*, with the most scrupulous good faith. *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). *Accord Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928). It is not the most scrupulous good faith to insist that what is not specifically forbidden by a treaty is allowed when the effect of so insisting is to prevent the exercise of a treaty right.

As a signatory to the ICRW, the United States is bound as a matter of international law to honor all of the provisions of that Convention.

In fact, the United States was the author and principal proponent of Article V-3 and has never subsequently lodged any reservation with respect to its applicability to all members of the ICRW. Consequently, Article 26 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/Conf. 39/27, *reprinted in* 63 Am. J. Int'l L. 875 (1969), is relevant:

> Every Treaty in force is binding upon the parties to it and must be performed by them in good faith.

The United States has signed and recognized but not ratified the Vienna Convention, which is "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971). The Restatement of Foreign Relations Law accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States. Restatement of Foreign Relations Law § 131 (Draft No. 6, 1985).

In addition, the Restatement further provides: "Courts in the United States are bound to give effect to international law and international agreements of the United States." *Id.* § 131(3). This principle clearly precludes the use of coercion to prevent exercise of one of the key rights of the ICRW.

Moreover, the use of an economic sanction to coerce Japan to relinquish its rights under Article V-3 of the ICRW also constitutes an abuse of right under international law. The use of the otherwise legitimate rights of the United States to control fishing in its fishery conservation zone and to regulate fish imports for the *express purpose* of avoiding its treaty obligation to honor Japan's right to object under Article V-3 is an abusive exercise of those rights.

> The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognized in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights. [6]

The concept of abuse of right includes evasion of treaty obligations (to respect the rights of fellow signatories) and is prohibited by and violates international law. Bin Cheng, *General Principles of Law as Applied by International Courts & Tribunals* 123 (1953). It is difficult to conceive of a more

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[6] *Fisheries Case* (U.K. v. Norway), 1951 I.C.J. 116, 142.

patent abuse of right than the use of economic force or the threat thereof to coerce a nation to relinquish a treaty right that the United States is obligated to recognize and honor in good faith.

C. Coercion Of Signatories To Abstain From Exercising Article V-3 Rights Conflicts With Established United States Foreign Policy.

The United States was the author and principal proponent of Article V-3. The retention of the power to object and become exempt from action taken by an international body pursuant to an international convention is an established principle of United States foreign policy. United States adherence to this principle as embodied in Article V-3 of the ICRW was rearticulated by the special ambassador to the Third International Conference on the Law of the Sea:

> The treaty provides for a review conference which, after five years of negotiations, may adopt amendments to the deep seabed mining regime that could automatically enter into force for the United States upon approval by three-fourths of the states parties and thus effectively bypass U.S. approval, including congressional advice and consent. Our only

> recourse would be denunciation of the convention -- an unacceptable choice.[7]

Under the interpretation of Pelly and Packwood-Magnuson by the Solicitor General and the court below, the United States would take the position before the world community that it will insist upon having and exercising an objection mechanism in all multilateral treaties in which it participates, but it will use economic sanctions to prevent other signatories from exercising the right that it demands. Such an interpretation is clearly wrong and should be avoided. There is no indication that Congress intended such a result when it enacted the Pelly and Packwood-Magnuson Amendments. As Judge Oberdorfer concluded in his dissent below (Pet. App. 45a):

> I cannot agree that, in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not

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[7] U.S. Department of State, Bureau of Public Affairs, Current Policy No. 4156, at 3 (statement of Special Ambassador Malone, Aug. 12, 1982). *See also id.* at 1-2 (statement of President Reagan) ("These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime . . . would allow amendments to enter into force for the United States without its approval; this is clearly incompatible with the U.S. approach to such treaties.").

adhering to an international whaling quota which is not binding on it.

III. COMMANDING THE EXECUTIVE TO DISHONOR AN INTERNATIONAL AGREEMENT SUCH AS THE MURAZUMI-BALDRIGE AGREEMENT EXCEEDS PRUDENTIAL AND EQUITABLE LIMITATIONS ON JUDICIAL AUTHORITY.

A. Giving A Command To An Official Of The United States To Dishonor An International Agreement Is Beyond The Authority of United States Courts.

The majority below failed to consider the question whether this case presents a justiciable question. As Judge Oberdorfer noted, "the justiciability issue is important and should ordinarily be decided before reaching the merits." (Pet. App. 49a.) "The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action." (*Id.* at 50a.)

The Supreme Court ruled in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918):

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and

> Legislative -- "the political" -- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

The Court has subsequently reaffirmed that "[t]he President alone has the power to speak or listen as a representative of the nation," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and that "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950). "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 82 L. Ed. 2d 171, 186 (1984) (citation omitted).

One of the tests of whether a case is nonjusticiable is "the possible consequences of judicial action." *Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962). If one of the "possible consequences of judicial action" is "embarrassment from multifarious pronouncements by various departments on one question," judicial action is barred. *Id.* at 217.

In this case the most severe embarrassment results from the action of the courts below:

(1) The Executive Branch is directed to dishonor the Murazumi-Baldrige Agreement, thereby resulting in a violation by the United States of international law and the disruption of relations between the United States and Japan.

(2) Foreign nations other than Japan are bound to look skeptically at the pledged words of the United States if judges are empowered to hold them for naught.

(3) The United States is placed in the untenable position of imposing massive sanctions on a country and its nationals for their very reliance on the word of the United States.

Clearly, these possible untoward consequences make this case, as Judge Oberdorfer suggested, "unsuitable for judicial action." (Pet. App. 50a.)

B. A Judicial Command To Dishonor An International Agreement And To Impose Severe Sanctions On Nationals Of A Friendly Nation For Conduct Authorized By The Agreement, Is An Abuse Of The Court's Equity Powers.

Judge Oberdorfer concluded that "it was not necessary . . . to determine whether the case is justiciable" (Pet. App. 50a-51a), in part because it was clear to him that equitable considerations counseled so strongly against the mandatory order entered by the district court. The same prudential considerations that call justiciability into question also call into question whether it was proper for the district court to exercise its equity powers at all in this case. These prudential considerations call for reversal of the district court's order, especially when evaluated in conjunction with traditional equity concerns, which militate strongly against the particular equitable choices made by the courts below.

The order violates the long established maxim that equity must do equity and the Supreme Court's holding that "the essence of equity jurisdiction has been the power of the Chancellor to do equity." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). This is a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable remedy. It 'is not a remedy which issues as of

course.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong and, as Judge Oberdorfer said, "weigh heavily in favor of the Secretary." The Government of the United States, through the Secretary of Commerce, has given its word in the reasonable understanding of the Pelly and Packwood-Magnuson Amendments that it has the authority to do so. The Government of Japan has made a reciprocal promise and acted on that promise to its detriment in reasonable reliance on the word of the United States.

Equity does not empower the district court to have entered the order it did, breaking the word of the United States and inflicting severe hardship on Japan and its nationals.

The Government of Japan was entitled to rely on the United States Government adhering to the Murazumi-Baldrige Agreement. Concerned over the threat of certification in 1984, Japan followed the ordinary and usual course available to foreign countries. It negotiated with the Executive Branch authorities responsible for implementing the statutes in question, relinquished its international treaty right to exempt itself from unacceptable IWC decisions, and agreed to limit and eventually discontinue its nationals' legitimate whaling activity. Japan made these major concessions with the assurance from the responsible United States authorities that, if Japan carried out its duties and obligations under the negotiated Agreement, the United States would fulfill its promise not to certify or sanction Japan for activities authorized by that Agreement.

Japan has performed its part of the bargain. It unconditionally withdrew its objection to the sperm whale quota, effective April 1, 1988, and it is committed to withdraw its objection to the moratorium upon the favorable outcome of this case. (Pet. App. 116a-17a.) It has taken these actions despite its conviction that the quotas to which those

objections would apply were not adopted in accordance with the requirements of the ICRW.

In addition, the Government of Japan has issued licenses to members of petitioner Japan Whaling Association as permitted by the Agreement, and it has ensured that those members have scrupulously adhered to the Agreement's limits. Japanese whalers have reduced their take of sperm whales from over 5000 whales in the 1977-78 coastal season to 400 whales in the 1984-85 season and the current 1985-86 season. They have promised to take no more than 200 whales in each of the 1986-87 and 1987-88 seasons, and to take *no* whales after April 1, 1988 -- promises that will be kept as faithfully as the promises for the current and preceding seasons have been kept. In view of such good faith performance of and reliance on the Murazumi-Baldrige Agreement, it cannot be said that the order of the district court is a sound exercise of equitable discretion. Rather, "such a major departure from that long tradition [equity must do equity] as is here proposed" should be allowed to stand. *Hecht Co.* v. *Bowles*, 321 U.S. at 330.

Equitable powers may not be used to inflict a penalty, particularly when those who would be punished have not personally done wrong. *Hartford Empire Co.* v. *United States*, 323 U.S. 386, 434-35 (1945). "Mandamus is not a punitive remedy." *Will* v. *U.S.*, 389 U.S. 90, 107 (1967). Although the

order in this case does not penalize the Secretaries of Commerce and State, it does inflict an undue penalty on Japan and particularly on members of petitioner Japan Fisheries Association. These innocent third parties depend on fishing in United States waters and on sales of fish for import to the United States, privileges that the district court's order would deny them. They could not possibly have taken any action to avoid such punishment. It would be difficult to postulate a more extreme perversion of the traditional principle that equity must do equity. *See Hecht Co.* v. *Bowles*, 321 U.S. at 329.

As Judge Oberdorfer concluded, the ultimate equity here is that the United States and Japan made reciprocal promises based on a reasonable interpretation of the Pelly and Packwood-Magnuson Amendments, and based on a host of scientific, diplomatic, economic, and prudential considerations that are beyond the competence of the judiciary to evaluate. Even if these considerations do not require the courts to stay their hands, the equities that "weigh heavily in favor of the Secretary" and Japan precluded such a use of equitable powers as the district court employed. In the interests of "elementary fairness," *Moser v. United States*, 341 U.S. 41, 47 (1950), the United States should not be allowed, much less compelled by the judiciary, to dishonor its word.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

[PREAMBLE]

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and

the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the

expiration of the ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

APPENDIX B

PELLY AMENDMENT
22 U.S.C. § 1978(a)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification To President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is

made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification To Congress

(B) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation Of Fish Products From Offending Country Prohibited

(C) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish

products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

APPENDIX C

PACKWOOD - MAGNUSON AMENDMENT
16 U.S.C §1821

TITLE II -- FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

§ 1821(e)(2) FOREIGN FISHING

(A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978 (a)).

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [§ 201(e)(1), 16 U.S.C. § 1821(e)(1)]

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the secretary of State, in consultation with the Secretary, by not less than 50 percent.

APPENDIX D

Proposed Packwood Amendment to the Packwood-Magnuson Amendment Rejected by House-Senate Conference Committee, and Accompanying Letter of Congressman Fascell, Chairman House Committee On Foreign Affairs

Sec. 301. Section 201(e)(2)(A)(i) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)(A)(i)) amended by inserting the following immediately after the first sentence thereof: "Any nation whose nationals conduct commercial whaling operations during or after the 1985/1986 pelagic whaling season or the 1986 coastal whaling season, unless such whaling has been authorized by the International Whaling Commission, shall be deemed to be certified for the purposes of this paragraph. Such nations shall also immediately be subject to the sanctions provided by paragraph (B) of this paragraph as soon as the Secretary has determined that such commercial whaling operations are being conducted.".

Sec. 302. Section 8(a) of the Fishermen's Protective Act 1967 (22 U.S.C. 1978(a)) is amended by adding at the end thereof the following:

"(5) A certification under this section which results from matters relating to whaling shall also be deemed a certification for purposes

of section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1921(e)(2).(e)(2)).".

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

September 6, 1984

The Honorable Mervyn M. Dymally
U. S. House of Representatives
Room 1717 Longworth House Office Building
Washington, D.C. 20515

Dear Merv:

Thank you for your recent letter and copies of your letter to Secretary of State George Shultz and recent statement from the Congerssional Record.

I appreciate your concern regarding the possibility that U.S. legislation would increase the severity of sanctions under the Magnuson Fishery Conservation and Management Act. My understanding is that the amendment proposing such sanctions was defeated in the House-Senate Conference on S. 2463, and that the Department of State opposed that amendment.

I am asking Peggy Galey of the Committee staff to follow-up on this matter with your office.

With best wishes, I am

Sincerely yours,

/s/Dante

Dante B. Fascell
Chairman

APPENDIX E

Excerpt From Transcript of the Treaty Negotiations of the International Convention for the Regulation of Whaling

Statement of R. Kellogg, Smithsonian Institution Archives, Record Unit 7165, International Whaling Commission, 1930-1968 Records, Box 9

[Dr. Remington Kellogg presented the United States position as follows (emphasis added).]

The delegation of the United States of America wishes to present the following observations concerning the establishment of a permanent commission of the regulation of whaling for the consideration of the Conference.

The Government of the United States of America favors in principle the eventual establishment by international agreement of a *standing committee with powers to make recommendations* regarding minimum lengths of whales, quotas, lengths of seasons, protected species, sanctuaries, and notification of take, such recommendations to become effective upon approval by the governments parties to the agreement. As the delegates are aware, this is the plan followed in various fishery treaties to which the Government of the United States of America is a party and which it has under consideration. *The advantages of this plan, whereby regulations are*

proposed by an expert international committee on the basis of scientific research and are put into effect by approval of each of the governments concerned, over the present method of a new treaty for each change or amendment, are obvious, particularly in view of the necessity for submitting each new treaty of this type to the United States Senate, with the resulting delays and burdens of dealing with administrative routine placed upon that body.

While this Government would, therefore, give favorable consideration to the establishment of an effective administrative machinery *for modifiying in specified minor respects* the terms of the international agreements on regulation of whaling, *it is not prepared at the present time to enter into any agreement for the establishment of an international commission having powers to modify the terms of agreements without the governments concerned having an opportunity to consider and approve or reject such suggested modifications before they become effective.* This Government would not under present conditions be disposed to empower any such commission to make regulations which would become effective without reference of such regulations to the several parties to the agreement for the approval prior to entry into effect.

(5) (5)

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-954, 85-955

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether domestic statutes require the Secretary of Commerce to determine and certify that, because Japanese nationals are taking certain species of whales in excess of international quotas by which Japan is not bound because it filed formal objections to them, the Japanese nationals are diminishing the effectiveness of the international convention under which the quotas were established, even though Japan has agreed with the United States (a) to withdraw, irrevocably, its formal objections to the quotas, (b) to limit its harvest of whales to numbers that scientific evidence indicated to the Secretary's satisfaction would not endanger the species of whales in question, and (c) to cease commercial whaling operations in 1988, which is two years later than when quotas established under the international convention will reach zero for all species of whales.

2. Whether a federal court may and, if it may, whether in the circumstances of this case it should order a Cabinet officer to make a determination and certification under a statute phrased generally and ambiguously when the result of the certification would be to breach an agreement between the United States and a friendly foreign nation and to impose severe punitive sanctions on that nation and its nationals.

THE PARTIES

The petitioners named in the captions were defendant-intervenor and defendant and appellants below. In addition, Japan Fisheries Association and Secretary of State George P. Shultz were defendant-intervenor and defendant, respectively, and appellants below. The plaintiffs and appellees below, respondents in this Court, are, in addition to the American Cetacean Society, the Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, The Fund for Animals, Greenpeace U.S.A., Thomas Garrett, The Humane Society of the United States, International Fund for Animal Welfare, and The Whale Center.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No.85-954

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

No.85-955

MALCOLM BALDRIGE, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 768 F.2d

426 and appear in the separately printed appendix to the petition in No. 85-955 (1a-55a). The district court opinion is reported at 604 F. Supp. 1398 and also appears in the separately printed appendix to the petition in No. 85-955 (56a-84a).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Timely petitions for rehearing and suggestions that rehearing be held *en banc* were denied on October 11, 1985 (*id.* at 94a-99a). The petitions for certiorari were filed on December 4, 1985, and the writs were granted on January 13, 1986. This Court has jurisdiction under 28 U.S.C § 1254(1).

STATUTES AND TREATIES INVOLVED

The pertinent provisions of the International Convention for the Regulation of Whaling, the Pelly Amendment, and the Packwood-Magnuson Amendment appear in the Appendices, at 1a-8a. The Murazumi-Baldrige

[1] The Court has granted leave to dispense with the filing of a joint appendix and has ordered that the separately printed appendix to the petition in No. 85-955 and the joint appendix submitted to the court below shall suffice in lieu thereof. The appendix to the petition in No. 85-955 is hereinafter cited as "Pet. App." The appendix attached to this brief is cited as "App."

Agreement and ancillary documents appear in Pet. App. 102a-119a.

STATEMENT

This case concerns an order of the district court, affirmed by a divided panel of the court of appeals, that if allowed to stand would place the United States in breach of an agreement with Japan. In that agreement, Japan made irrevocable concessions, satisfactory to the responsible United States Executive Branch official, intended to avoid precisely the punitive sanction that the court's order would force the Executive Branch to impose. This extraordinary exercise of judicial power arises out of a controversy over commercial whaling operations.

The Convention And Whale Quotas

The International Convention for the Regulation of Whaling (ICRW) was signed in 1946 and entered into force for the United States in 1948. It established a system of international regulation the purposes and objectives of which are "to protect all species of whales from further overfishing" with the recognition that "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales that may be captured

without endangering these natural resources." The ICRW was to be administered "without causing widespread economic and nutritional distress . . . and thus make possible the orderly development of the whaling industry." International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.S.T. 72, T.I.A.S. No. 1949, Preamble (App. 1a-2a).

The International Whaling Commission (IWC), created by the ICRW, establishes and sets forth in its so-called "Schedule" such matters as annual whaling quotas, the whaling seasons, and regulations governing permissible whaling methods. All amendments to the Schedule including whaling quotas must, to be lawfully enacted, comply with Article V-2 of the ICRW. That Article requires, *inter alia*, (1) that the amendment be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) that the amendment "be based on scientific findings," and (3) that it "take into consideration the interests of the consumers of whale products and the whaling industry." (App. 2a.)

Under the terms of Article V-3 of the ICRW, any government that presents an objection to the IWC within 90 days of notification of the adoption of an amendment to the Schedule is exempt, and the amendment does not become effective as to the objecting

government. (App. 2a-3a.) The right to present an objection is absolute and unqualified.

In 1981, the IWC, in Footnote 1 to Table 3 of the Schedule, established a zero catch limit for the Western Division Stock of North Pacific Sperm Whales. The IWC adopted this amendment without satisfying the three requirements of Article V-2 of the ICRW. On November 1, 1981, Japan filed a timely objection to Footnote 1 of Table 3 pursuant to Article V-3 of the ICRW. Thereafter, the IWC reconsidered and agreed to allow a taking of 450 sperm whales in the 1982-83 coastal season and 400 sperm whales in the 1983-84 coastal season but did not establish a quota for the 1984-85 coastal season or for any period thereafter.[2] Japan thereupon announced its intent to take whales inasmuch as the filing of the timely objection enabled Japan to do so without being in violation of the ICRW.

In 1982, the IWC adopted an amendment that would impose a moratorium on all commercial whaling effective at the end of the 1985-86 coastal whaling season and the 1984-85 pelagic (high seas) whaling season. As in the case of the sperm whale quotas, the IWC adopted this amendment without satisfying the

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[2] The season for sperm whales, which are taken off coastal Japan, runs from August of each year through March of the following year.

three requirements of Article V-2 noted above.[3] Japan also filed a timely objection to this amendment pursuant to Article V-3 of the treaty.

The United States Statutes

Two United States statutes bear on this case. In 1971, Congress enacted the so-called Pelly Amendment to the Fishermen's Protective Act, which is Section 8(a) of that statute. 85 Stat. 768, 22 U.S.C. § 1978(a) (App. 4a-6a). Its operative provision reads:

> When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which

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[3] In particular, the IWC failed to base its moratorium decision on scientific findings. As explained by the official observer of the United Nations Food and Agriculture Organization at the International Whaling Commission, 34th Session: "The continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure. Given the differing status of the various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium. A justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds, but these seem outside the terms of reference of the Commission."

> diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

Id. § 1978(a)(1). The President, upon receipt of certification by the Secretary of Commerce, is authorized by Section 8(a)(3) (App. 4a-5a) to direct the Secretary of the Treasury to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade.

In 1979, Congress enacted the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, as Section 201(e)(2). 90 Stat. 337, 16 U.S.C. § 1821(e)(2) (App. 7a-8a). The Packwood-Magnuson Amendment deals specifically with whaling and with the ICRW. It provides for an automatic sanction, the reduction of at least 50 percent of a country's allocation of fish that it can harvest in the United States fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that diminishes the effectiveness of the ICRW.

Certifications under either the Pelly Amendment or the Packwood-Magnuson Amendment have been rare, and sanctions have been imposed only once. In the usual case, the possibility of United States certification and

sanction has led to negotiations between the United States and a country whose nationals are suspected of activity that diminishes the effectiveness of the ICRW (or some other ocean resources conservation program), and to the conclusion of an agreement that, in the view of the United States, furthers conservation objectives, eliminating the need for sanctions. That is what happened here.

The Murazumi-Baldrige Agreement

Prior to the beginning of the 1984-85 coastal whaling season, Japan entered into discussions with American officials in an attempt to resolve differences and avoid confrontation between the two nations on whaling issues. These discussions resulted in an exchange of letters between Yasushi Murazumi, Chargé d'Affaires *ad interim* of Japan, and Malcolm Baldrige, United States Secretary of Commerce, in which it was agreed that, if Japan withdrew its objection to the IWC's zero quota for sperm whales, then the Japanese could take up to 400 sperm whales in each of the 1984-85 and 1985-86 coastal seasons without being deemed to have "diminished the effectiveness" of the ICRW.

Secretary Baldrige stated by letter to Mr. Murazumi his conclusion that the limited amount of whaling in which Japan would be permitted to engage would not in fact diminish

the effectiveness of the ICRW conservation program:

> After consulting with the United States Commissioner to the International Whaling Commission (IWC), I have concluded that commercial harvest of whales by Japanese nationals within the limits and under the circumstances set forth in the Summary of Discussions attached to your letter [*i.e.*, 400 sperm whales in each of the 1984-85 and 1985-86 seasons] would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program.

(Pet. App. 107a.) The Secretary explained the basis for this conclusion (*id.* at 107a-08a):

> The reports of the IWC's Scientific Committee, as well as the IWC's 1982 decision to permit quotas of 450 and 400 whales for the 1982 and 1983 coastal sperm whaling seasons, respectively, indicate that sperm whaling in accordance with paragraph 1 of the Summary of Discussions attached to your letter is not inconsistent with the IWC's essential conservation purposes.

On December 11, 1984, the Government of Japan, pursuant to its undertaking in the Murazumi-Baldrige Agreement, filed a withdrawal, effective April 1, 1988, of its objection to Footnote 1 to Table 3 of the IWC Schedule pertaining to sperm whales. This withdrawal, by the terms of the IWC, is irrevocable. (Pet. App. 4a.)

There is a second part of the Murazumi-Baldrige Agreement. It provides that, if Japan agrees to end all commercial whaling by April 1, 1988, by withdrawing its objection to the general IWC moratorium as of that date, then the Japanese may take no more than 200 sperm whales in each of the 1986-87 and 1987-88 coastal seasons and may take other species of whales subject to other limitations to be negotiated between the United States and Japan, without the imposition of Pelly or Packwood-Magnuson sanctions. (Pet. App. 106a.)

Japan has not withdrawn its objection to the general moratorium because of the district court's decision, which would order Secretary Baldrige to dishonor this Agreement. However, Japan has committed itself to withdraw the second objection if that order is overturned. (Pet. App. 116a-17a.) In that event, all commercial whaling by Japanese nationals will cease on April 1, 1988.

The Proceedings Below

This action was brought in November 1984 before agreement had been reached between the United States and Japan. The plaintiffs are twelve animal welfare and conservation organizations and a former United States deputy commissioner to the IWC. The defendants are Secretary of Commerce Baldrige and Secretary of State Shultz. These petitioners, the Japan Whaling Association and the Japan Fisheries Association, intervened as a matter of right on the side of the two United States Cabinet officers.

The district court, Judge Richey, heard the case on cross-motions for summary judgment after the Murazumi-Baldrige Agreement was concluded. Judge Richey granted the plaintiffs' motion. He held that the phrase "diminish the effectiveness" of the ICRW as used in the Pelly and Packwood-Magnuson Amendments means, in the context of this case, any taking of whales in excess of an ICRW quota. In Judge Richey's view, the statutes preclude the exercise of judgment by the Secretary of Commerce; he must certify whenever nationals of a country have exceeded an ICRW quota, whatever the circumstances. The district court's judgment therefore directed the Secretary of Commerce to make a certification, in violation of the agreement that the Secretary himself had concluded with the Government of Japan, that would result in the automatic imposition of the

Packwood-Magnuson sanction on Japan and its fishing industry.

The court of appeals stayed the district court's judgment and heard the appeal on an expedited basis. It affirmed, agreeing with "the District Court's ultimate conclusion that certification in this case is mandatory, though . . . for slightly different reasons." On the basis of statements made during the course of congressional consideration of the Pelly and Packwood-Magnuson Amendments, the court of appeals held that, "although in some situations the Secretary has discretion whether to certify, the Secretary is required by law to certify a foreign country whose nationals are harvesting whales in excess of ICRW quotas." (Pet. App. 3a.) Judge Wright's opinion to this effect was joined by the late Judge Tamm.

District Judge Oberdorfer, sitting by designation, dissented. He said that he could not agree that, "in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it." (*Id.* at 45a.) He also expressed his doubt that the case, which resulted in "add[ing] the Judicial Branch's voice to this delicate process" of conducting foreign affairs (*id.* at 50a), was justiciable; he said further that, even granting justiciability, the equities

required that the court abstain from exercising its powers in this situation.

Petitions for rehearing with suggestions for rehearing *en banc* were filed. Four of the seven active circuit judges who considered the *en banc* suggestions stated their "substantial agreement with the views expressed in Judge Oberdorfer's dissent" and would have granted the requested *en banc* rehearing. (Pet. App. 95a, 99a.) Two active circuit judges did not participate. Rehearing *en banc* therefore was denied for want of the majority of all the circuit judges in regular active service, including non-participants, that the court below requires in applying Fed. R. App. P. 35(a).

Interim Whaling By Japan

Members of the petitioner Japan Whaling Association, operating under licenses granted by their government, took the number of sperm whales allowed by the Murazumi-Baldrige Agreement in the 1984-85 coastal season. They are whaling again during the current 1985-86 season, which will end in April. Again, as in the first season, there have been no violations or even allegations that Japanese whalers have exceeded the permissible take of 400 sperm whales. If the judgment below is reversed, Japan Whaling Association members will take only 200 sperm whales in each of the following two coastal seasons, and all commercial

Japanese whaling will cease at the end of the second such season, on April 1, 1988.

SUMMARY OF ARGUMENT

I

The language of the Pelly and Packwood-Magnuson Amendments, calling for a determination by the Secretary of Commerce whether certain conduct by foreign fishermen or whalers diminishes the effectiveness of an international fisheries conservation program, is plainly discretionary language, requiring the Secretary to exercise his informed judgment. Had Congress wished to impose upon him the duty of certifying any taking of fish or whales in excess of an international quota, it would have used quite different language.

The judgmental purport of the language is confirmed by the legislative history of the two statutes, a point that will be fully developed in the brief for the federal petitioners. Among the key items of the legislative history are (1) the understanding manifested in 1978, when the Packwood-Magnuson Amendment was enacted, by two key participants in the legislative process -- the chairman of the pertinent House subcommittee and the President -- that, under the existing Pelly Amendment and the new provision, certification was not mandatory for any and all violations of quotas but was

discretionary; and (2) the same understanding manifested in 1984 by the surviving author of the Packwood-Magnuson Amendment when he proposed a further amendment that would clearly have made certification and sanctions obligatory when a quota was exceeded.

Even if there were a serious question whether Congress intended to delegate authority to the Secretary of Commerce to exercise judgment with respect to certification under the Pelly and Packwood-Magnuson Amendments, he himself has so construed his authority. That construction by the responsible administrator of the statute is reasonable, and it must therefore be respected by a reviewing court. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

To read the two statutes as requiring the Secretary of Commerce to certify a foreign nation in every case in which an international fisheries quota is exceeded is to raise unnecessarily a serious constitutional question -- the question whether sovereign power of the United States has been unlawfully delegated to an international body, the International Whaling Commission. The improper delegation objection is avoided only if the statutes are read as providing for the intervention of an exercise of judgment on the part of a United States official before sanctions are imposed to enforce such a body's decision.

II

A long-standing rule of statutory construction, reiterated and applied by this Court two years ago in *Trans World Airlines* v. *Franklin Mint Corp.*, 104 S. Ct. 1776, 1783 (1984), requires that Congress express itself clearly and unambiguously if it is to be deemed to have abrogated or modified an existing treaty. In this case the relevant treaty, the ICRW, expressly provides in Article V-3 that a nation may exempt itself from a quota established by the IWC. If the United States imposes sanctions on such a nation for exceeding a quota that by the terms of the Convention is not applicable to it, the result is the unilateral modification or abrogation by the United States of a right under a treaty to which it subscribes. The language of the Pelly and Packwood-Magnuson Amendments does not express clearly and unambiguously an intent to reach a nation that, by filing an objection, has made a whaling (or other) quota inapplicable to it. The history of the Amendments does not reflect any intent on the part of Congress to abrogate or modify the ICRW or other fishery treaties.

Application of the Pelly and Packwood-Magnuson Amendments to a nation that has filed an objection and thus exempted itself from an international fishery quota would place the United States in violation of international law. The Convention does not, explicitly or implicitly,

allow such an application of sanctions, and the coercion of a treaty signatory to forgo a treaty right is condemned by principles of international law. Moreover, it runs counter to the policy of the United States, which is to insist upon escape valves such as Article V-3 of the ICRW.

III

The case is not justiciable. It is not within the judicial power of a United States court to command an Executive Branch official to dishonor an international agreement, as the United States would be here required to dishonor the Murazumi-Baldrige Agreement. Under the test of justiciability stated in *Baker* v. *Carr*, 369 U.S. 196, 217 (1962), the courts below should have considered the consequences of judicial action, including "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." The nation is embarrassed by having to dishonor its word, by having to do so at the expense of foreign nationals who have acted in reliance on its word, and by so behaving that its word is regarded skeptically by all other nations.

Even if the case is justiciable, traditional equitable considerations demanded that the courts below stay their hands. An injunction is an equitable remedy that should be withheld

where the equities so warrant. The same thing is true if the order below is regarded as in the nature of mandamus. Here the equities weigh strongly in favor of the Secretary of Commerce and these intervening Japanese petitioners, on whom the judicially mandated sanctions would fall. The overriding equitable consideration is that the order of the courts below would have the United States repudiate an agreement on which these petitioners have relied and impose a sanction in retribution for the very conduct in which they engaged in good faith on the strength of the word of the United States.

ARGUMENT

The federal defendants will develop the arguments that:

(1) on its face, the language of the Pelly and Packwood-Magnuson Amendments -- "diminish the effectiveness" -- calls for the exercise of judgment by the Secretary of Commerce in making his decision whether activities of foreign nationals in fact diminish the effectiveness of an international fishery conservation program, and particularly the International Convention for the Regulation of Whaling;

(2) the legislative history does not compel (or even seriously suggest) a reading of the statutes that departs from their plainly judgmental terms and instead imposes on a Cabinet officer acting in the delicate, shifting arena of international relations a ministerial duty to punish another nation; and

(3) in any event, the Secretary's reading of the statutes as calling for the exercise of his judgment is a reasonable, if not required, reading, and is therefore entitled to judicial deference -- greater deference than usual for the very reason that the statutes deal here with foreign relations.

Petitioners Japan Whaling Association and Japan Fisheries Association endorse those arguments fully. In Part I, petitioners state summarily the argument that will be fully developed in the government's companion brief, emphasizing certain aspects of the legislative history, and intending not to duplicate the government's brief. Also in Part I, these petitioners urge that a serious constitutional question of unlawful delegation is raised if the statutes are read as making the Secretary of Commerce a mere instrument for enforcing decisions of the International Whaling Commission.

Japan Whaling Association and Japan Fisheries Association, representatives of the Japanese citizens whose good faith whaling brought on the judicially mandated sanctions that the Court is considering and who would be immediately affected by the imposition of those sanctions, argue in this brief -- with the approbation of their government -- that the statutes do not require the imposition of the sanctions for a more fundamental reason: Under the ICRW itself and therefore at international law, Japan, having filed objections to the IWC quotas in question, is exempt from those quotas and legally free to ignore them.

Domestic United States statutes should not and indeed cannot, consonantly with international law, be construed as providing for the mandatory imposition of sanctions against a nation that has done no wrong in the eyes of its treaty partners (which include the United States) or in the eyes of the international community more generally. That argument is developed in Part II hereunder.

In Part III, these petitioners urge that the subject matter of the suit is such that it should not have been entertained and that, in any event, no United States court can or properly should enter the order that has been entered in this case. Limitations on judicial power and considerations of equity counsel against any judicial order compelling a high official to act in

breach of an international agreement that he has concluded with a friendly nation, on which that nation and its citizens have relied in good faith, and to impose upon the friendly nation for that very reliance the precise penalty that both parties intended the agreement to avoid.

I. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS DO NOT REQUIRE THE SECRETARY OF COMMERCE TO CERTIFY AUTOMATICALLY ANY NATION WHOSE CITIZENS TAKE WHALES IN EXCESS OF AN IWC QUOTA.

The Secretary of Commerce concluded on the basis of his study of the scientific data, prior actions of the IWC, consultation with the United States Commissioner to the IWC, and the Japanese undertaking in the Murazumi-Baldrige Agreement that the taking by Japan of the limited number of whales allowed by the Agreement before Japanese commercial whaling was phased out would not diminish the effectiveness of the ICRW. That is plainly an allowable judgment under the terms of the governing statutes.

A. The Plain Meaning Of The Statutory Language Grants Discretion To The Secretary Whether To Certify.

On their face, the Pelly and Packwood-Magnuson Amendments authorize the

Secretary of Commerce to exercise discretion in determining whether to certify a nation for its whaling activities. The critical language in the Pelly Amendment, mirrored in the Packwood-Magnuson Amendment, directs the Secretary to certify a nation when he "determines that [its nationals], directly or indirectly, are conducting fishing operations . . . which diminish the effectiveness" of an international fishing conservation program. (App. 4a. *Cf. id.* at 7a.) Congress did not command the Secretary to certify any nation whose nationals take whales in excess of an IWC quota. Had that been its intent, it would have used language very different from language directing the Secretary to make the plainly judgmental determination whether conduct diminishes the effectiveness of a conservation agreement.

Such a determination requires an analysis of the fishing or whaling operations and the international conservation program in question; it also demands the application of the expertise of the Secretary and his subordinates, who are uniquely qualified to analyze the effect of such operations on the international program. A determination whether conduct diminishes the effectiveness of a multilateral treaty is no mere ministerial act. It calls, instead, for careful evaluation and ultimate resolution by a high-ranking Cabinet official of matters of great importance to United States conservation and foreign policy. In short, the plain meaning of

the statutes is to authorize the Secretary to exercise discretion.

B. The Legislative History Confirms That The Secretary Has Discretion Under The Statutes.

The legislative history of both the Pelly and Packwood-Magnuson Amendments confirms that the Secretary is meant to exercise his judgment in determining whether a nation has acted so as to diminish the effectiveness of the ICRW. Petitioners leave to the Solicitor General a full analysis of the legislative history and the lower courts' misapprehension of it. Petitioners invite the Court's attention to two points that merit particular attention.

First, statements made at the time of enactment of the Packwood-Magnuson Amendment in 1979, by a responsible legislator and by the final actor in the legislative process, the President, demonstrate that, under both Packwood-Magnuson and the earlier Pelly Amendment, the Secretary's determination whether a nation's actions diminish the effectiveness of the ICRW was understood to be a discretionary determination.

The effect of the Packwood-Magnuson Amendment was to make the imposition of sanctions mandatory when a nation is certified

for diminishing the effectiveness of the ICRW. Under the Pelly Amendment, the imposition of sanctions had been discretionary (and continues to be for other conservation programs).

Congressman Breaux, chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, of the House Merchant Marine and Fisheries Committee, carefully explained the change and made clear in doing so that under both Amendments the Secretary's original decision whether to certify was discretionary. He stated his understanding that "under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration." *Hearings Before the Subcommittee on Fisheries and Wildlife and the Environment of the House Committee on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 314-15 (1979) [hereinafter cited as *Hearings*]. These, he continued, were:

> First, in certifying that a country is in violation of some international agreement, and there is a lot of flexibility in that certification [,] and, second, after a nation is certified there is still discretion in determining whether a ban on imports of that country's products will in fact be imposed against that country. Therefore, under Pelly we

> have two discretionary features, whereas in the Packwood amendment, you are really taking all of the discretionary features and putting them in the first category which is the certification of a nation being in violation of an international agreement.

The court of appeals dismissed what Congressman Breaux said, characterizing it as "ambiguous." (Pet. App. 36a n.20.) In reality, this statement is not in the least ambiguous. Congressman Breaux clearly stated, *Hearings*, *supra*, at 317, that "[t]he Secretary has the discretion in making a certification decision."

President Carter reiterated Congressman Breaux's point when he signed the Packwood-Magnuson Amendment into law. He said:

> With regard to both the Packwood-Magnuson and Pelly Amendments the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.[4]

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[4] Presidential Signing Statement, 15 Weekly Comp. Pres. Doc. 35 (Aug. 15, 1979).

Second, Senator Packwood, one of the sponsors of the Packwood-Magnuson Amendment, made clear his understanding of the Secretary's discretionary role when he introduced in 1984 a further amendment to the Magnuson Fishery Conservation and Management Act. His amendment would have eliminated any occasion for a judgmental determination by the Secretary of Commerce. His proposal was to "deem to be certified" for the purposes of the Packwood-Magnuson Amendment "[a]ny nation whose nationals conduct commercial whaling operations [after 1986] unless such whaling has been authorized by the International Whaling Commission." (App. 9a.) Had Senator Packwood believed that the 1979 amendment he authored already required certification of a country whose nationals were exceeding IWC quotas, he would not have proposed that further amendment. His amendment was defeated in a House-Senate Conference Committee. *See* Letter from Congressman Dante B. Fascell, Chairman of House Committee on Foreign Affairs, to Congressman Mervyn M. Dymally (Sept. 6, 1984) (App. 11a).

C. Deference Is Owing To The Secretary's Reasonable Construction Of The Statutes He Administers.

Apart from all else, the Secretary of Commerce in this case, and on prior occasions, has consistently construed the Pelly and Packwood-Magnuson Amendments as calling for a judgment on his part whether particular fishing or whaling activity diminishes the effectiveness of the ICRW or some other international fishing convention. His interpretation of the statutes is clearly correct, based on their language and their history, and is at the very least reasonable. It therefore commands the deference of a reviewing court under familiar principles that this Court has emphasized again and again in the last several terms. *See, e.g., Chevron, U.S.A.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2782 & n.9 (1984). *See also Chemical Manufacturers Association* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1112 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975).

D. An Interpretation Of The Statutes As Imposing On The Secretary A Ministerial Duty To Certify Any Taking In Excess Of IWC Quotas Unnecessarily Raises A Serious Constitutional Question Concerning Unlawful Delegation Of Power.

The court below interpreted the Pelly and Packwood-Magnuson provisions as manifesting a congressional intent "to provide enforcement leverage" to the IWC. The court's opinion candidly admits that, under the terms of this IWC enforcement machinery, "[d]iscretion is vested in the international body rather than in the member nations," *i.e.*, discretion is vested in the IWC rather than in the Executive Branch of the United States Government. (Pet. App. 40a.) According to this interpretation, whenever the IWC exercises its discretion and, for example, adopts a zero quota or a moratorium, the Secretary of Commerce lacks any discretion and must certify a nation once he finds that nationals of that country have taken a single whale. Upon such certification the Secretary of State must automatically impose the Packwood-Magnuson sanction.

This interpretation of the Pelly and Packwood-Magnuson Amendments raises a serious question whether Congress has

authority under the Constitution to fashion a system in which the Secretaries of Commerce and State become the enforcement arm of the IWC.

Congress has never attempted forthrightly to delegate Executive Branch power to an international organization. Consequently, there are no judicial decisions that have directly ruled on the question whether Congress has power to subject the Executive Branch to the will of an entity such as the IWC to enforce its legislation. This Court long ago indicated, however, in *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), that Congress has no such power:

> [The powers of government] cannot be granted away or restrained on behalf of anyone. [They] are delegated in trust to the United States, and are incapable of transfer to other parties. They cannot be abandoned or surrendered.

From the delegation cases of the 1930s we know that there are limits on the power of Congress to delegate legislative powers to executive agencies, state agencies, and private industrial groups. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

And we know that the doctrine of those cases is alive, cautioning against any open-ended construction of statutes conferring powers on executive agencies. Three Justices recently joined in a prevailing opinion that warned against statutory interpretations that "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). A concurring Justice thought the statute unconstitutional as a standardless delegation of power. *Id.* at 671-88 (concurring opinion of Rehnquist, J.).

The construction of Pelly and Packwood-Magnuson that results in the conferral of all discretionary authority upon the IWC, leaving United States officials as mere enforcers of decisions reached by another body, presents an *a fortiori* case of unconstitutional delegation.

One of the fundamental objections to overbroad delegation is that it vests power in the hands of persons or entities that are not accountable, as Congress is, to the electorate of the United States. In the decided cases, the delegate was at least a domestic United States entity, *i.e.*, an organization approved by the

President or a state or federal agency. In the instant case, the delegate would be the IWC, an international organization that is in no way accountable to the American electorate.

Second, in *Panama Refining* and *Schechter*, the President retained discretion to approve or modify the acts of the delegate. In the instant case the authority that would be delegated to the IWC is the Executive Branch power to exercise discretion to determine when it is lawful to issue certification and thereby impose the Packwood-Magnuson sanction. The Executive Branch would be deprived of all discretion. The discretion would be vested in the IWC.

Finally, another fundamental policy objection to overbroad delegation is the potential for abuse of the lawmaking and enforcement process. In the instant case the amendments establishing the moratorium and zero quota were enacted without compliance with Article V-2 of the ICRW, which establishes prerequisites to the adoption of quotas by the IWC, yet the court below would have the Executive Branch enforce these amendments as a ministerial duty.

This Court has repeatedly held that courts must adopt statutory interpretations which "avoid constitutional problems." *National Cable Television Association* v. *United States*, 415 U.S. 336, 342 (1974). As Justice

Brandeis stated in his famous concurring opinion in *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.

Here the constitutional construction of the Pelly and Packwood-Magnuson Amendments is not just "fairly possible." It is commanded by text, history, and principles of deference. The constitutional doubt -- a serious doubt -- therefore is easily avoided.

II. THE STATUTES SHOULD NOT BE READ AS REQUIRING THE IMPOSITION OF SANCTIONS AGAINST A NATION THAT HAS EXEMPTED ITSELF FROM THE INTERNATIONAL REQUIREMENT THAT THE SANCTIONS ARE INTENDED TO ENFORCE.

A. An Interpretation Of The Statutes As Applying To A Party That Has Exempted Itself From An IWC Quota Improperly And Unnecessarily Creates A Conflict Between The Statutes And The ICRW.

This Court has held repeatedly that federal domestic legislation enacted subsequent to the conclusion of a treaty to which the United States is a party must be construed in a fashion consistent with the treaty provisions unless Congress *expressly* repeals or modifies the treaty provision. The most recent statement of this rule came two years ago:

> There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Trans World Airlines v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (citation omitted). A century earlier, the Court had said much the same thing: "[T]he court ought, if possible, to adopt that construction which recognized and saved rights secured by the Treaty." *Chew Heong* v. *United States*, 112

U.S. 536, 549 (1884). *See also Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress").

Section 134 of the most recent version of the Restatement of Foreign Relations Law (Tentative Draft No. 6, 1985), codifies these decisions: "A United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."

Article V-3 of the ICRW allows a signatory nation to object to an IWC quota and render that quota inapplicable to it. A nation that has properly objected is free under the Convention and under generally recognized principles of international law to ignore the IWC quota to which it has objected. As a party to the ICRW, the United States is bound by Article V-3 as much as by any other provision of the Convention. Indeed, the United States has been at the forefront of the nations that have insisted upon escape valves such as Article V-3 as a condition of signing multilateral conventions (*see* Part II.C., *infra*).

If the Pelly and Packwood-Magnuson Amendments are construed as applicable to a nation that has filed Article V-3 objections -- as calling for the imposition of sanctions on such a nation because it has exceeded a quota from

which it is exempt -- then those statutes are inconsistent with Article V-3 and indeed abrogate the treaty right that is stated in Article V-3. In the absence of much more explicit language, the Pelly and Packwood-Magnuson Amendments cannot be so construed.

Indeed, Congress clearly intended the Amendments to authorize certification only when a nation has violated the ICRW by failing to enforce lawfully binding quotas upon their nationals. Literally every Congressman who addressed the subject clearly indicated that only violations, flagrant violations, or flouting of the Convention could be regarded as conduct that diminishes the effectiveness of the Convention.[5] A nation that has exempted itself under Article V-3 is not lawfully bound by the relevant quota, is not in violation of the ICRW, and cannot be certified under the Amendments.

Petitioners make this argument with full knowledge that the Pelly Amendment was born of the need felt by Congress to do something about salmon fishing by Danish nationals at a time when Denmark had objected to a salmon

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[5] For example, Congressman Pelly's own definition of conduct that "diminishes the effectiveness" of the treaty was a "case of *flagrant violations* of any international fishery conservation program to which the United States has committed itself." 117 Cong. Rec. 34752 (1971) (emphasis added). *See also* 125 Cong. Rec. 21743 (1979) (statement of Sen. Packwood); *id.* (statement of Sen. Magnuson); *id.* at 22082-83 (statement of Cong. Murphy).

quota under a provision comparable to Article V-3. Congress, to be sure, acted with the Danish fishermen in mind. But it acted without a hint anywhere in the legislative history of the Pelly Amendment (or of the Packwood-Magnuson Amendment for that matter) that it meant to act inconsistently with United States treaty undertakings. The want of any expressed intent so to act -- the want of any expressed intent to abrogate Article V-3 and comparable provisions of other fisheries conventions -- requires that, despite their genesis, the statutes be read as not applying to a nation that has exercised its Article V-3 rights.

B. The Imposition Of Sanctions Against Japan Would Result In Violation Of International Law.

It is not only the rule of construction that has come down from *Chew Heong* and was so lately restated in the *Trans World Airlines* case that condemns any application of the Pelly and Packwood-Magnuson Amendments to a nation that has exempted itself from an ICRW quota. Any such application also results in violation of international law.

The court below believed that the use of Pelly and Packwood-Magnuson sanctions as "enforcement leverage," to coerce signatory nations not to exercise their unqualified right to object and become exempt from unacceptable

IWC action, does not violate international law. The court did not support this conclusion with either analysis or judicial authority. It merely stated that "[t]here is no prohibition in the Convention against member nations acting unilaterally to force an objecting member . . . to comply with the Convention's regulations, even when those regulations are not binding on the member . . . under the terms of the Convention itself." (Pet. App. 5a n.1.) The Solicitor General makes the same argument.

The "coercion" thesis advanced by both the court below and the Solicitor General is inherently fallacious. It would vitiate the concept of treaty-making if signatories were free to coerce fellow signatories to abstain from the exercise of unqualified treaty rights by the threat of sanctions authorized by domestic legislation unless the treaty itself forbade the use of such coercion. This Court has consistently held that treaties must be interpreted in a spirit of *uberrima fides, i.e.*, with the most scrupulous good faith. *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). *Accord Jordan* v. *Tashiro*, 278 U.S. 123, 127 (1928). It is not the most scrupulous good faith to insist that what is not specifically forbidden by a treaty is allowed when the effect of so insisting is to prevent the exercise of a treaty right.

As a signatory to the ICRW, the United States is bound as a matter of international law to honor all of the provisions of that Convention.

In fact, the United States was the author and principal proponent of Article V-3 and has never subsequently lodged any reservation with respect to its applicability to all members of the ICRW. Consequently, Article 26 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/Conf. 39/27, *reprinted in* 63 Am. J. Int'l L. 875 (1969), is relevant:

> Every Treaty in force is binding upon the parties to it and must be performed by them in good faith.

The United States has signed and recognized but not ratified the Vienna Convention, which is "the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971). The Restatement of Foreign Relations Law accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements, and therefore as foreign relations law of the United States. Restatement of Foreign Relations Law § 131 (Draft No. 6, 1985).

In addition, the Restatement further provides: "Courts in the United States are bound to give effect to international law and international agreements of the United States." *Id.* § 131(3). This principle clearly precludes the use of coercion to prevent exercise of one of the key rights of the ICRW.

Moreover, the use of an economic sanction to coerce Japan to relinquish its rights under Article V-3 of the ICRW also constitutes an abuse of right under international law. The use of the otherwise legitimate rights of the United States to control fishing in its fishery conservation zone and to regulate fish imports for the *express purpose* of avoiding its treaty obligation to honor Japan's right to object under Article V-3 is an abusive exercise of those rights.

> The principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognized in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle to the exercise of rights. [6]

The concept of abuse of right includes evasion of treaty obligations (to respect the rights of fellow signatories) and is prohibited by and violates international law. Bin Cheng, *General Principles of Law as Applied by International Courts & Tribunals* 123 (1953). It is difficult to conceive of a more

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6 *Fisheries Case* (U.K. v. Norway), 1951 I.C.J. 116, 142.

patent abuse of right than the use of economic force or the threat thereof to coerce a nation to relinquish a treaty right that the United States is obligated to recognize and honor in good faith.

C. Coercion Of Signatories To Abstain From Exercising Article V-3 Rights Conflicts With Established United States Foreign Policy.

The United States was the author and principal proponent of Article V-3. The retention of the power to object and become exempt from action taken by an international body pursuant to an international convention is an established principle of United States foreign policy. United States adherence to this principle as embodied in Article V-3 of the ICRW was rearticulated by the special ambassador to the Third International Conference on the Law of the Sea:

> The treaty provides for a review conference which, after five years of negotiations, may adopt amendments to the deep seabed mining regime that could automaticaily enter into force for the United States upon approval by three-fourths of the states parties and thus effectively bypass U.S. approval, including congressional advice and consent. Our only

> recourse would be denunciation of the convention -- an unacceptable choice.[7]

Under the interpretation of Pelly and Packwood-Magnuson by the Solicitor General and the court below, the United States would take the position before the world community that it will insist upon having and exercising an objection mechanism in all multilateral treaties in which it participates, but it will use economic sanctions to prevent other signatories from exercising the right that it demands. Such an interpretation is clearly wrong and should be avoided. There is no indication that Congress intended such a result when it enacted the Pelly and Packwood-Magnuson Amendments. As Judge Oberdorfer concluded in his dissent below (Pet. App. 45a):

> I cannot agree that, in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not

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[7] Bureau of Public Affairs, U.S. Dep't of State, Current Policy No. 4156, at 3 (statement of Special Ambassador Malone, Aug. 12, 1982). *See also id.* at 1-2 (statement of President Reagan) ("These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime . . . [that] would allow amendments to enter into force for the United States without its approval; this is clearly incompatible with the U.S. approach to such treaties.").

adhering to an international whaling quota which is not binding on it.

III. COMMANDING THE EXECUTIVE TO DISHONOR AN INTERNATIONAL AGREEMENT SUCH AS THE MURAZUMI-BALDRIGE AGREEMENT EXCEEDS PRUDENTIAL AND EQUITABLE LIMITATIONS ON JUDICIAL AUTHORITY.

A. Giving A Command To An Official Of The United States To Dishonor An International Agreement Is Beyond The Authority Of United States Courts.

The majority below failed to consider the question whether this case presents a justiciable question. As Judge Oberdorfer noted, "the justiciability issue is important and should ordinarily be decided before reaching the merits." (Pet. App. 49a.) "The hazards of such judicial involvement in issues ordinarily reserved for the political departments of our government could make this controversy unsuitable for judicial action." (*Id.* at 50a.)

The Supreme Court ruled in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918):

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and

> Legislative -- "the political" -- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

The Court has subsequently reaffirmed that "[t]he President alone has the power to speak or listen as a representative of the nation," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), and that "the President is exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950). "Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.' " *Regan* v. *Wald*, 82 L. Ed. 2d 171, 186 (1984) (citation omitted).

One of the tests of whether a case is nonjusticiable is "the possible consequences of judicial action." *Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962). If one of the "possible consequences of judicial action" is "embarrassment from multifarious pronouncements by various departments on one question," judicial action is barred. *Id.* at 217.

In this case the most severe embarrassment results from the action of the courts below:

(1) The Executive Branch is directed to dishonor the Murazumi-Baldrige Agreement, thereby resulting in a violation by the United States of international law and the disruption of relations between the United States and Japan.

(2) Foreign nations other than Japan are bound to look skeptically at the pledged words of the United States if judges are empowered to hold them for naught.

(3) The United States is placed in the untenable position of imposing massive sanctions on a country and its nationals for their very reliance on the word of the United States.

Clearly, these possible untoward consequences make this case, as Judge Oberdorfer suggested, "unsuitable for judicial action." (Pet. App. 50a.)

B. A Judicial Command To Dishonor An International Agreement And To Impose Severe Sanctions On Nationals Of A Friendly Nation For Conduct Authorized By The Agreement Is An Abuse Of The Court's Equity Powers.

Judge Oberdorfer concluded that "it was not necessary . . . to determine whether the case is justiciable" (Pet. App. 50a-51a), in part because it was clear to him that equitable considerations counseled so strongly against the mandatory order entered by the district court. The same prudential considerations that call justiciability into question also call into question whether it was proper for the district court to exercise its equity powers at all in this case. These prudential considerations call for reversal of the district court's order, especially when evaluated in conjunction with traditional equity concerns, which militate strongly against the particular equitable choices made by the courts below.

The order violates the long established maxim that equity must do equity and the Supreme Court's holding that "the essence of equity jurisdiction has been the power of the Chancellor to do equity." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). This is a case in which equities had to be weighed before relief was granted, for "an injunction is an equitable

remedy. It 'is not a remedy which issues as of course.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Manufacturing Co.*, 289 U.S. 334, 337-38 (1933)). The issuance of an injunction is in the sound discretion of the court. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." 456 U.S. at 313. And "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312. The necessity to weigh the equities is not different if the case is regarded as one of mandamus. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central Railroad*, 349 U.S. 366, 373 (1955).

Here the equitable considerations arguing against an injunction or mandamus are extraordinarily strong and, as Judge Oberdorfer said, "weigh heavily in favor of the Secretary." The Government of the United States, through the Secretary of Commerce, has given its word in the reasonable understanding of the Pelly and Packwood-Magnuson Amendments that it has the authority to do so. The Government of Japan has made a reciprocal promise and acted on that promise to its detriment in reasonable reliance on the word of the United States.

Equity does not empower the district court to have entered the order it did, breaking the word of the United States and inflicting severe hardship on Japan and its nationals.

The Government of Japan was entitled to rely on the United States Government adhering to the Murazumi-Baldrige Agreement. Concerned over the threat of certification in 1984, Japan followed the ordinary and usual course available to foreign countries. It negotiated with the Executive Branch authorities responsible for implementing the statutes in question, relinquished its international treaty right to exempt itself from unacceptable IWC decisions, and agreed to limit and eventually discontinue its nationals' legitimate whaling activity. Japan made these major concessions with the assurance from the responsible United States authorities that, if Japan carried out its duties and obligations under the negotiated Agreement, the United States would fulfill its promise not to certify or sanction Japan for activities authorized by that Agreement.

Japan has performed its part of the bargain. It unconditionally withdrew its objection to the sperm whale quota, effective April 1, 1988, and it is committed to withdraw its objection to the moratorium upon the favorable outcome of this case. (Pet. App. 116a-17a.) It has taken these actions despite its conviction that the quotas to which those

objections would apply were not adopted in accordance with the requirements of the ICRW.

In addition, the Government of Japan has issued licenses to members of petitioner Japan Whaling Association as permitted by the Agreement, and it has ensured that those members have scrupulously adhered to the Agreement's limits. Japanese whalers have reduced their take of sperm whales from over 5000 whales in the 1977-78 coastal season to 400 whales in the 1984-85 season and the current 1985-86 season. They have promised to take no more than 200 whales in each of the 1986-87 and 1987-88 seasons, and to take *no* whales after April 1, 1988 -- promises that will be kept as faithfully as the promises for the current and preceding seasons have been kept. In view of such good faith performance of and reliance on the Murazumi-Baldrige Agreement, it cannot be said that the order of the district court is a sound exercise of equitable discretion. Rather, "such a major departure from that long tradition [equity must do equity] as is here proposed" should not be allowed to stand. *Hecht Co.* v. *Bowles*, 321 U.S. at 330.

Equitable powers may not be used to inflict a penalty, particularly when those who would be punished have not personally done wrong. *Hartford Empire Co.* v. *United States*, 323 U.S. 386, 434-35 (1945). "Mandamus is not a punitive remedy." *Will* v. *U.S.*, 389 U.S. 90, 107 (1967). Although the

order in this case does not penalize the Secretaries of Commerce and State, it does inflict an undue penalty on Japan and particularly on members of petitioner Japan Fisheries Association. These innocent third parties depend on fishing in United States waters and on sales of fish for import to the United States, privileges that the district court's order would deny them. They could not possibly have taken any action to avoid such punishment. It would be difficult to postulate a more extreme perversion of the traditional principle that equity must do equity. *See Hecht Co.* v. *Bowles*, 321 U.S. at 329.

As Judge Oberdorfer concluded, the ultimate equity here is that the United States and Japan made reciprocal promises based on a reasonable interpretation of the Pelly and Packwood-Magnuson Amendments, and based on a host of scientific, diplomatic, economic, and prudential considerations that are beyond the competence of the judiciary to evaluate. Even if these considerations do not require the courts to stay their hands, the equities that "weigh heavily in favor of the Secretary" and Japan precluded such a use of equitable powers as the district court employed. In the interests of "elementary fairness," *Moser* v. *United States*, 341 U.S. 41, 47 (1950), the United States should not be allowed, much less compelled by the judiciary, to dishonor its word.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

[PREAMBLE]

The Governments whose duly authorized representatives have subscribed hereto,

Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;

* * *

Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources;

Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress;

* * *

Desiring to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the

International Agreement for the Regulation of Whaling signed in London on June 8, 1937 and the protocols to that Agreement signed in London on June 24, 1938 and November 26, 1945; and

Having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry;

Have agreed as follows:

* * *

ARTICLE V

* * *

2. These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; . . . and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry.

3. Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if

any Government presents to the Commission objection to any amendment prior to the expiration of the ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals.

APPENDIX B

PELLY AMENDMENT
22 U.S.C. § 1978(a)

Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

Certification To President

(a) (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

* * *

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit

the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification To Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation Of Fish Products From Offending Country Prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish

products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

APPENDIX C

PACKWOOD - MAGNUSON AMENDMENT 16 U.S.C §1821(e)(2).

(A) For the purposes of this paragraph --

(i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section [8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978 (a))].

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) [§ 201(e)(1), 16 U.S.C. § 1821(e)(1)] that --

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be

made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

APPENDIX D

PROPOSED PACKWOOD AMENDMENT TO THE PACKWOOD-MAGNUSON AMENDMENT REJECTED BY HOUSE-SENATE CONFERENCE COMMITTEE, AND ACCOMPANYING LETTER OF CONGRESSMAN FASCELL, CHAIRMAN, HOUSE COMMITTEE ON FOREIGN AFFAIRS

Sec. 301. Section 201(e)(2)(A)(i) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)(A)(i)) amended by inserting the following immediately after the first sentence thereof: "Any nation whose nationals conduct commercial whaling operations during or after the 1985/1986 pelagic whaling season or the 1986 coastal whaling season, unless such whaling has been authorized by the International Whaling Commission, shall be deemed to be certified for the purposes of this paragraph. Such nations shall also immediately be subject to the sanctions provided by paragraph (B) of this paragraph as soon as the Secretary has determined that such commercial whaling operations are being conducted.".

Sec. 302. Section 8(a) of the Fishermen's Protective Act 1967 (22 U.S.C. 1978(a)) is amended by adding at the end thereof the following:

"(5) A certification under this section which results from matters relating to whaling shall also be deemed a certification for purposes

of section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1821(e)(2)).".

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

September 6, 1984

The Honorable Mervyn M. Dymally
U. S. House of Representatives
Room 1717 Longworth House Office Building
Washington, D.C. 20515

Dear Merv:

Thank you for your recent letter and copies of your letter to Secretary of State George Shultz and recent statement from the Congerssional Record.

I appreciate your concern regarding the possibility that U.S. legislation would increase the severity of sanctions under the Magnuson Fishery Conservation and Management Act. My understanding is that the amendment proposing such sanctions was defeated in the House-Senate Conference on S. 2463, and that the Department of State opposed that amendment.

I am asking Peggy Galey of the Committee staff to follow-up on this matter with your office.

With best wishes, I am

Sincerely yours,

/s/Dante

Dante B. Fascell
Chairman

APPENDIX E

EXCERPT FROM TRANSCRIPT OF THE TREATY NEGOTIATIONS OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

Statement of R. Kellogg, Smithsonian Institution Archives, Record Unit 7165, International Whaling Commission, 1930-1968 Records, Box 9

[Dr. Remington Kellogg presented the United States position as follows (emphasis added).]

The delegation of the United States of America wishes to present the following observations concerning the establishment of a permanent commission of the regulation of whaling for the consideration of the Conference.

The Government of the United States of America favors in principle the eventual establishment by international agreement of a *standing committee with powers to make recommendations* regarding minimum lengths of whales, quotas, lengths of seasons, protected species, sanctuaries, and notification of take, such recommendations to become effective upon approval by the governments parties to the agreement. As the delegates are aware, this is the plan followed in various fishery treaties to which the Government of the United States of America is a party and which it has under consideration. *The advantages of*

this plan, whereby regulations are proposed by an expert international committee on the basis of scientific research and are put into effect by approval of each of the governments concerned, over the present method of a new treaty for each change or amendment, are obvious, particularly in view of the necessity for submitting each new treaty of this type to the United States Senate, with the resulting delays and burdens of dealing with administrative routine placed upon that body.

While this Government would, therefore, give favorable consideration to the establishment of an effective administrative machinery *for modifiying in specified minor respects* the terms of the international agreements on regulation of whaling, *it is not prepared at the present time to enter into any agreement for the establishment of an international commission having powers to modify the terms of agreements without the governments concerned having an opportunity to consider and approve or reject such suggested modifications before they become effective.* This Government would not under present conditions be disposed to empower any such commission to make regulations which would become effective without reference of such regulations to the several parties to the agreement for the approval prior to entry into effect.

Nos. 85-954 and 85-955

Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides that the Secretary of Commerce shall certify if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) provides, more specifically, that the Secretary of Commerce shall certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling. 16 U.S.C. 1821(e)(2). The questions presented are:

1. Whether the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify Japan, an important foreign ally culturally and historically committed to whaling, which presently declines to follow certain international whale harvesting quotas but has entered into an agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988.

2. Even if the Secretary of Commerce does have such a nondiscretionary duty to certify, whether the issuance of a writ of mandamus ordering certification is appropriate in the circumstances of this case.

PARTIES TO THE PROCEEDING

The petitioners in No. 84-955 are: Malcolm Baldrige, Secretary of Commerce; and George Shultz, Secretary of State. The respondents are:

American Cetacean Society;
Animal Protection Institute of America;
Animal Welfare Institute;
Center for Environmental Education;
The Fund for Animals;
Greenpeace U.S.A.;
The Humane Society of the United States;
International Fund for Animal Welfare;
The Whale Center;
Connecticut Cetacean Society;
Defenders of Wildlife;
Friends of the Earth;
Thomas Garrett;
Japan Whaling Association;
Japan Fisheries Association.

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Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L.Q. 323 (1977) 3
Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543 (1984) 3
U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972* (June 1985) 43-44, 45

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U.S. Policy with Respect to the International Protection of Whales: Hearing and Mark-up on H.R. Con. Res. 54 Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations, 99th Cong., 1st Sess. (1985) 7, 8, 44

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-954

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

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MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a)[1] is reported at 768 F.2d 426. The opinion of the district court (Pet. App. 56a-84a) is reported at 604 F. Supp. 1398.

JURISDICTION

The judgment of the court of appeals (Pet. App. 90a-91a) was entered on August 6, 1985. Petitions for rehearing were denied on October 11, 1985 (Pet. App. 92a-99a). Petitions for a writ of certiorari were filed on December 4, 1985 and were granted on January 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition in No. 85-955. "J.A." and "S.A." refer to the court of appeals appendices, copies of which have been lodged with the Clerk of this Court.

STATUTES INVOLVED

The relevant statutes are reproduced in Addendum I, *infra*, 1a-2a.

STATEMENT

Section 8(a)(1) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides that the Secretary of Commerce shall certify to the President if the nationals of a foreign country "are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." 22 U.S.C. 1978(a)(1).[2] Upon certification, the President may, in his discretion, prohibit importation of fishery products from the certified nation. 22 U.S.C. 1978(a)(4). Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) contains a similar certification provision, directed specifically to whaling, that results in mandatory imposition of severe economic sanctions. See 16 U.S.C. 1821(e)(2).[3] Under those provisions, if the Secretary of Commerce certifies that nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the International Convention for the Regulation of Whaling (ICRW), the Secretary of State must reduce, by at least 50%, the foreign nation's fishery allocation in the United States' fishery conservation zone. 16 U.S.C. 1821(e)(2).

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[2] The Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.*, is generally designed to provide compensation to fishermen whose vessels are seized by foreign nations based on jurisdictional claims not recognized by the United States.

[3] The Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, enacted in 1976, established a United States fishery conservation zone extending 200 nautical miles seaward from the United States' coast. See 16 U.S.C. 1811. The United States exercises exclusive fishery management authority within the conservation zone (16 U.S.C. 1812) and generally may allocate surplus fishery resources—which would not be used by United States fishermen—to foreign countries in accordance with various criteria in the Act (16 U.S.C. 1821).

The central issue in these consolidated cases is whether the Pelly and Packwood Amendments allow the Secretary of Commerce no discretion in determining whether to certify an ICRW party that formally objects to and departs from whale harvesting quotas. Respondents, a coalition of private wildlife organizations, contend that the Secretary must certify a foreign nation whenever its nationals exceed, in any amount and under any circumstances, a whaling harvest quota established under the ICRW. The court of appeals agreed and affirmed the issuance of a writ of mandamus ordering the Secretary to certify Japan. The order would compel the imposition of severe economic sanctions[4] on an important foreign ally, culturally and historically committed to whaling, that has entered into a formal agreement with the United States—already partially performed—to rescind its objections and effectively terminate its commercial whaling industry by April 1, 1988.

1. The International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716 *et seq.* (entered into force Nov. 10, 1948), provides the principal international mechanism for promoting the conservation and development of whale populations. The ICRW, proposed by the United States in 1946, is implemented pursuant to the Whaling Convention Act, 16 U.S.C. 916 *et seq.* It originally responded to a worldwide decline in whale harvests following World War II.[5] The ICRW was expressly intended to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." 62 Stat. 1717. Originally signed by 15 countries and designed for the benefit of whaling nations, the ICRW now has 41 signa-

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[4] The Japanese petitioners estimate that a 50% reduction in Japan's fishery allocation "would cost Japanese nationals $1.8 billion" (85-954 Pet. 12).

[5] See, *e.g.*, Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 Ecology L. Q. 323, 352-353 (1977); see generally Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543 (1984).

tories, most of which have either discontinued or have never engaged in commercial whaling.[6] As the membership of non-whaling nations has grown, the ICRW increasingly has been utilized to protect whales from overexploitation.

The ICRW regulates whale harvesting practices through a Schedule which, among other matters, sets harvest limits for whale species. Art. I, 62 Stat. 1717; see 62 Stat. 1723-1727.[7] The ICRW also establishes the International Whaling Commission (IWC), a multi-national deliberative body that implements portions of the convention. Art. III, 62 Stat. 1717-1718. The IWC is composed of one commissioner from each member country, whether a whaling or a non-whaling nation (*ibid.*). The IWC, through a three-fourths' majority vote of its members, may amend the Schedule, including the harvest limits. Art. V, 62 Stat. 1718-1719. The ICRW expressly provides that a member country may file objections to IWC amendments of the Schedule (*id.* at 1719). If the country files a timely objection, it is under no obligation to comply with the amendment; however, the amendment will apply to non-objecting countries (*ibid.*).

Since the early 1970s, the IWC meetings have proven increasingly volatile and politicized as member countries have split into sharply polarized camps.[8] The whaling

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[6] The eight countries traditionally identified as commercial whaling nations are Japan, the Soviet Union, the Republic of Korea, Iceland, Norway, Peru, Chile, and Spain. Japan, which joined the ICRW in 1951, is generally recognized as the most significant of the remaining whaling countries. The United States, which was once a major commercial whaling nation, discontinued its whaling activities in 1971.

[7] The original Schedule set forth requirements for inspection of whaling operations (62 Stat. 1723), prohibitions on the taking of various whales (*id.* at 1723-1724), harvest quotas based on "blue-whale units" (*id.* at 1724), minimum size limitations (*id.* at 1724-1725), methods of factory ship operation (*id.* at 1725), and harvest reporting requirements (*id.* at 1726).

[8] Congressional staff reports, written from the non-whalers' perspective, describe the emotion and acrimony of recent sessions. See,

nations, including Japan, the Soviet Union, and Norway, have contended that the scientific evidence supports continued whaling of selected species. The non-whaling nations, including the United States, have supported stricter harvest limits and, as a conservative management measure, a general moratorium on commercial whaling.[9] Following long and fierce debates, the IWC recently reached specific decisions on two particularly controversial topics —sperm whale quotas and a general commercial whaling moratorium—that are central to the present dispute.

In 1981, the IWC, acting on the advice of its Scientific Committee, reduced the yearly harvest quota for the Western Division Stock of North Pacific sperm whales—a coastal stock harvested only by Japanese whalers—from 890 adult males to zero adult males (Pet. App. 11a, 45a-46a, 65a).[10] Soon thereafter, Japan filed a timely objection (*ibid.*). However, in 1982, prior to any Japanese whaling pursuant to this objection, the IWC provided a temporary suspension of the quota, permitting Japan to harvest 450 sperm whales in the 1982 coastal season and

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e.g., *Review of the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 3-25 (1982) [hereinafter cited as *Review of the 34th IWC Meeting*]; *Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 2-15 (1981) [hereinafter cited as *Review of the 33d IWC Meeting*].

[9] As a result, the non-whaling nations generally have been successful in reducing harvest quotas. The total commercial harvest quota, covering all species, fell from 45,673 whales in 1973 to 12,371 whales in 1982. See *Review of the 34th IWC Meeting* 100.

[10] The Scientific Committee, which provides the IWC with assessments of whale populations, recommended a zero quota in 1981, based on its uncertainty concerning the population's size. See *Review of the 33d IWC Meeting* 6. The Seychelles, one of the most vocal whale conservation proponents, suggested that new scientific evidence could reopen discussion of sperm whale quotas (*ibid.*).

400 sperm whales in the 1983 coastal season.[11] In 1983, the Japanese Commissioner requested the Scientific Committee to consider whether Japan's present catch had any significant effect on the sperm whale population of the Western Division Stock. The Scientific Committee responded in 1984 that continued harvests of 400 sperm whales per year for up to five years would have only a small effect on the stock in the short term. The Committee could not reach a consensus on the potential long-term effects of that harvest level.[12] In 1984, the temporary suspension of the zero quota for the Western Division Stock lapsed by its own terms and the zero quota once again went into force. Japan continued its objection and thus retained an exemption from that quota (*id.* at 11a-12a, 46a, 65a-66a).

During this same period, the IWC also considered suggestions for whaling moratoria. In 1982, the IWC adopted a moratorium on all commercial whaling effective at the beginning of the 1985/1986 pelagic whaling season (which began in fall 1985) for high seas whaling and at the start of the 1986 coastal season (which applies to any coastal whaling commencing in 1986) for coastal whaling (Pet. App. 11a, 47a, 66a). The moratorium had long been urged by the United States as a conservative management measure in light of the lack of sufficient data to make accurate population projections for many whale stocks. The IWC has determined that the moratorium will be reconsidered by 1990, but will remain in effect

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[11] The Scientific Committee was unable to reach any consensus on the status of the population at that time. See *Review of the 34th IWC Meeting* 9.

[12] The 1984 Scientific Committee Report specifically states:

> The Committee agreed that, if continued for a short period (possibly up to five years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term. The Committee was unable to agree on what the long term effect on the stock of such catches might be.

Report of the Scientific Committee (IWC 36/4) ¶ 10.1.1.7 (May 26, 1984). The Committee's full response to the Japanese request is set out as Addendum II, *infra*, 3a.

until changed by a three-fourths vote of IWC members. Japan, Norway, and the Soviet Union filed timely objections to the moratorium. Peru also filed an objection but later withdrew it.

In autumn 1984, the United States informed Japan that the Pelly and Packwood Amendments might be invoked in response to the sperm whaling activities of Japanese nationals. Japan, in reply, entered into discussions with the Departments of State and Commerce to reach a solution that would satisfy the concerns of both countries.[13]

On November 13, 1984, following extensive negotiations, Japan and the United States concluded an executive agreement through an exchange of letters between the Charge d'Affaires of Japan and the Secretary of Commerce (Pet. App. 102a-109a). Subject to implementation (as described in note 14, *infra*), the Government of Japan pledged to adhere to strict harvest limits and to cease commercial whaling by 1988 (Pet. App. 102a-106a). In response to this pledge, the Secretary determined, after review of IWC Scientific Committee opinions and consultation with the United States Commissioner to the IWC, that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to phase out and discontinue all commercial whaling by 1988, would not "diminish the effectiveness" of the ICRW (*id.* at 107a-109a). Accordingly, the Secretary in-

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[13] The Soviet Union and Norway would also be potentially subject to certification if they continued their whaling after the commencement of the moratorium. However, the Soviet Union has already been certified as a consequence of its minke whaling activities and Norway does not receive fishery allocations in the United States' fishery conservation zone. See *U.S. Policy with Respect to the International Protection of Whales: Hearing and Mark-up on H.R. Con. Res. 54 Before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations*, 99th Cong., 1st Sess. 53 (1985) [hereinafter cited as *1985 House Hearing*].

formed Japan that certification would not be necessary provided that Japan complied with its pledge (*ibid.*).[14]

On December 11, 1984, Japan fulfilled the first part of the agreement by withdrawing its objection to the IWC sperm whale quota, effective April 1, 1988 (Pet. App. 110a, 112a-114a). That irrevocable action will bring to an end Japanese commercial sperm whaling activities.

2. Several days before consummation of the November 13, 1984 executive agreement, respondents filed suit in the United States District Court for the District of Columbia, requesting a writ of mandamus compelling the Secretary to certify Japan.[15] The Japan Whaling Association and the Japan Fishing Association (the Japanese petitioners), trade groups representing private Japanese interests, intervened.

On March 5, 1985, the district court granted summary judgment for respondents and ordered the Secretary to

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[14] The details of the Japanese commitments were explained in a summary accompanying the letter from the Charge d'Affaires to the Secretary. First, it was agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985 coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective on April 1, 1988. This undertaking would effectively end Japanese commercial sperm whaling.

Second, the two nations agreed that if Japan would end *all* commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Under that part of the agreement, Japan would harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whales—under limitations acceptable to the United States, using the most recently voted IWC quota for those whales as a guideline—through the end of the 1986/87 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate all commercial whaling operations by withdrawing its objection to the IWC moratorium, on or before April 1, 1985, effective April 1, 1988.

[15] These groups later urged Congress to condemn the agreement. See *1985 House Hearing* 13. Congress took no action in response to their request.

certify Japan at once (Pet. App. 56a-86a). The district court observed that the Secretary was required to certify nations that "diminish the effectiveness" of the ICRW, but noted that neither the Pelly nor the Packwood Amendment defined that crucial phrase. The court nevertheless concluded that Congress intended the phrase to deprive the Secretary of all discretion to withhold certification whenever a country exceeds, by any amount and in any circumstances, an IWC harvest quota (*id.* at 83a-84a, 85a-86a). The district court denied the government's motion for a stay pending appeal; however, the court of appeals granted a stay on March 18, 1985 (*id.* at 87a-89a). Shortly thereafter, on April 5, 1985, the Government of Japan informed the Secretary of Commerce that Japan would perform the second condition of the agreement—withdrawal of its objection to the IWC moratorium—provided that the United States obtained reversal of the district court's order (*id.* at 116a-119a).

On August 6, 1985, a divided court of appeals upheld the district court order requiring immediate certification of Japan (Pet. App. 1a-55a). The court found that the Pelly and Packwood Amendments did not define the specific activities that would "diminish the effectiveness" of the ICRW; it therefore looked for enlightenment in the legislative history (*id.* at 22a). Based on its examination (*id.* at 22a-41a), the court concluded that the Secretary of Commerce has no discretion in determining whether to certify a nation whose whalers depart from the IWC harvest quotas. It stated (*id.* at 41a-42a):

> Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conservation program, it has *per se* diminished the effectiveness of that program. In such a case the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifically, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary.

The court of appeals concluded that mandamus was appropriate because "the Secretary had a nondiscretionary

duty in these circumstances to certify Japan" (*id.* at 42a).

Judge Oberdorfer, sitting by designation, dissented (Pet. App. 45a-55a). He observed that this dispute involved delicate foreign relations issues directly affecting the United States' relations with Japan (*id.* at 49a-51a). He stated that the foreign repercussions of this dispute "heighten the need for forbearance by the courts in the absence of a clear command from Congress" (*id.* at 51a). In his view, the legislative history relied upon by the court was "far from conclusive" (*id.* at 52a) and "does not so plainly alter the language of the statute as to leave the Secretary no discretion to decide whether Japan's stance *vis a vis* the [IWC] quota and the moratorium 'diminishes the effectiveness' of the Convention" (*id.* at 53a). Furthermore, he concluded that a mandamus remedy was inappropriate in light of the international relations implications and equities of the case (*id.* at 54a-55a).[16]

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States and Japan have successfully employed diplomacy to resolve the delicate issue of Japanese whaling. The resulting executive agreement—already partially performed—will lead to the effective termination of Japan's commercial whaling industry by April 1, 1988. This agreement is a salutary achievement; it has produced, *for the first time*, a binding commitment from the world's premier whaling nation to comply with a comprehensive commercial whaling moratorium. The agreement advances the worldwide interest in preserving whale populations. At the same, it recognizes that our

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[16] Petitions for rehearing and suggestions for rehearing en banc were subsequently denied. Of the circuit's nine active judges, four supported en banc review, expressing substantial agreement with Judge Oberdorfer's dissent. Three judges voted against en banc rehearing and two judges recused themselves. Thus, the en banc suggestions obtained the concurrence of a majority of the participating judges but a minority of the active judges (Pet. App. 94a-95a, 98a-99a).

ally Japan, an island nation historically and culturally tied to whaling, has firmly opposed comprehensive whaling moratoria in the past and now faces a difficult transition period in shutting down a significant domestic industry. As Japan's Charge d'Affaires noted, the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling" (Pet. App. 103a). The Secretary of Commerce has determined that this diplomatic compromise ultimately advances the goals of whale conservation.[17]

The court of appeals' decision repudiates this important achievement. The court errs on at least two counts. First, it mistakenly concludes that the Pelly and Packwood Amendments require the Secretary of Commerce automatically to certify any departure from International Whaling Commission harvest quotas as "per se diminish[ing] the effectiveness" (Pet. App. 41a-42a) of the International Convention for the Regulation of Whaling, regardless of the attendant circumstances. Second, it employs the extraordinary judicial remedy of mandamus in plainly inappropriate circumstances.

I. The Pelly and Packwood Amendments instruct the Secretary of Commerce to certify a foreign nation when he determines that its nationals are engaged in activities that "diminish the effectiveness" of the ICRW. The broad language of these statutes invests the Secretary with equally broad discretion—and responsibility—to determine whether specific whaling activities meet the "diminish the effectiveness" standard in any particular case. It places the decision exclusively within the informed judgment of the Secretary.

Indeed, the language is not only broad; it is also unqualified. The Pelly and Packwood Amendments do not direct the Secretary to consider any specific factors in reaching his conclusion nor do they require the Secretary to reach a particular conclusion in any specific case.

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[17] See Affidavit of Malcolm Baldrige (J.A. 107-113), reprinted as Addendum III, *infra*, 4a-9a.

Instead, they leave the determination to the informed discretion of the Executive Branch officer charged with specific responsibility for whale conservation and oceanic affairs. Under the plain language of these statutes, the Secretary is required to consider all relevant factors in determining whether a departure from an IWC harvest quota "diminishes the effectiveness" of the ICRW. His determination, which may turn on such factors as the nature, seriousness, and circumstances of the departure, can in no sense be considered a "ministerial" duty.

There is nothing unusual in this grant of discretion. Congress, recognizing the President's preeminent role in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936). The Pelly and Packwood Amendments, which employ a standard that relies upon an Executive Branch determination that certain activities "diminish the effectiveness" of international conventions, exhibit the familiar congressional deference to executive judgment in a matter affecting international relations.

The legislative history and background of the "diminish the effectiveness" standard confirm the Secretary's broad discretionary authority. That standard, a mainstay of the United States' international conservation programs, has been incorporated into five Acts of Congress over a period of 22 years. The legislative history of each of these Acts—the 1962 Amendments to the Tuna Conventions Act, the 1971 Pelly Amendment, the 1978 amendment of the Pelly Amendment, the 1979 Packwood Amendment, and the 1984 Eastern Pacific Tuna Licensing Act—reveals a consistent, repeated, and purposeful intention to preserve Executive Branch discretion. Congress plainly employs the "diminish the effectiveness"

standard to invoke the use of Executive Branch expertise and judgment in international conservation matters.

The legislative history is particularly persuasive on account of what it does *not* say. Nowhere in the legislative history is there an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Instead, the legislative history simply reflects the undisputed understanding that the Pelly and Packwood Amendments will frequently be applied in response to such departures.

Even if the plain language and legislative history were ambiguous, this Court should defer to the reasonable interpretation of the Secretary of Commerce, the Executive Branch official charged with administration of the statute. This deference is particularly appropriate in a statute dealing with international wildlife conservation, a subject that raises difficult scientific questions and delicate foreign relations issues.

The Secretary quite reasonably has interpreted the Pelly and Packwood Amendments to permit consideration of all relevant factors in the certification process. The Executive Branch must be able to apply its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW. The present case tellingly illustrates the reasonableness of that interpretation. The United States, through the use of diplomacy and negotiation, has convinced Japan, the premier whaling nation, to dismantle its commercial whaling industry in exchange for a short-term continuance of limited whaling. This dramatic and important success for whale conservation could not be guaranteed through a strict rule of automatic certification in response to any quota violation. The mechanical approach advocated by respondents is both dangerous and unwise; it would increase disharmony among nations and impede international conservation efforts.

Thus, we submit that the Secretary may properly conclude that a foreign nation, such as Japan, that departs

in a limited and temporary way from IWC harvest quotas, but nevertheless enters into a binding agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988, has not "diminished the effectiveness" of the ICRW.

II. The court of appeals plainly erred in employing mandamus in this case. The common law writ of mandamus, as codified in 28 U.S.C. 1361, provides relief only in response to government failure to perform nondiscretionary duties. Since the Pelly and Packwood Amendments instruct the Secretary to exercise informed judgment, a plaintiff cannot compel certification through mandamus. Furthermore, even if the Secretary's certification responsibilities were ministerial, mandamus would be inappropriate in this case. It is doubtful that the Pelly and Packwood Amendments create any "duty owed to" respondents. But even if they do, the remedy remains subject to institutional and equitable considerations. In particular, this Court has made clear that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

It is apparent that the court of appeals' decision, if left standing, would have serious foreign relations implications. An agreement between nations—already partially performed—would, in effect, be repudiated. Japan would face severe economic sanctions and domestic dislocations. International comity would more generally be impaired since other nations would justifiably doubt the United States' ability to resolve international disputes through diplomacy and compromise, free from judicial intervention. Japan stands ready to complete its obligations under the agreement (Pet. App. 116a-119a). Repudiation of that agreement would be a grave blow to both whale conservation and international cooperation.

ARGUMENT

Congress, through the Pelly and Packwood Amendments, has instructed the Secretary of Commerce to determine and certify whether foreign nationals are conducting whaling operations that "diminish the effectiveness" of the ICRW. The principal question in these consolidated cases is whether Congress, through that general instruction, silently intended that any departure from IWC harvest quotas should completely and conclusively control the Secretary's determination.

The Japanese petitioners and the respondents take sharply contrasting positions on this issue. The Japanese petitioners, at one extreme, contend (85-955 Pet. 20-21) that the Secretary is precluded from certifying any nation that has filed a timely objection to the quota, noting that the objection excuses it from the ICRW's compliance requirements. Respondents, at the other extreme, contend (Br. in Opp. 8) that Congress intended certification "to be an automatic, mandatory and nondiscretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas."

We submit that neither of these interpretations is sound. Congress vested the Secretary of Commerce with discretion to consider all relevant factors in determining whether particular whaling activity "diminishes the effectiveness" of the ICRW. The Amendments do not instruct the Secretary to reach his conclusion by looking at only one side of the ledger. The Secretary may reasonably inquire into the nature, seriousness, and circumstances of the quota departure in reaching his ultimate conclusion. Furthermore, even if the Secretary had no discretion, mandamus would be unwarranted in the present case.

I. THE PELLY AND PACKWOOD AMENDMENTS DO NOT REQUIRE AUTOMATIC CERTIFICATION IN RESPONSE TO ANY DEPARTURE FROM IWC WHALE HARVESTING QUOTAS

A careful reading of the Pelly and Packwood Amendments reveals that the Secretary exercises broad discre-

tion in determining whether particular whaling activities "diminish the effectiveness" of the ICRW. Nowhere do these statutes state that a departure from harvest quotas or, for that matter, any other particular whaling restriction, is automatically subject to "mandatory and nondiscretionary" certification. Instead, the Amendments place the certification decision squarely within the Secretary's informed judgment. The legislative history supports the plain import of the statutory language. It shows that Congress contemplated that certification decisions under the Pelly and Packwood Amendments, as well as under kindred conservation statutes, would be based upon a careful evaluation of the circumstances surrounding the particular activities in question. Even if the language and legislative history were open to dispute, this Court should defer to the Secretary's reasonable construction of the statutes that he is assigned to administer. Here, it is manifest that the Secretary has adopted a reasonable interpretation of the Pelly and Packwood Amendments.

A. The plain language of the Amendments vests the Secretary with discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW

The Pelly and Packwood Amendments each provide a three-step process for certification and sanctioning of improper whaling activities. In the case of each Amendment, the Secretary of Commerce must first determine whether foreign nationals are conducting harvesting operations that "diminish[] the effectiveness" of the ICRW. 22 U.S.C. 1978(a)(1); see 16 U.S.C. 1821(e)(2).[18] If the Secretary finds that such operations are taking place, he next "shall certify such fact." 22 U.S.C. 1978(a)(1); see 16 U.S.C. 1821(e)(2). Finally, upon formal certification, the foreign nation will be subject to

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[18] The Pelly Amendment, as a general matter, applies to all "'international fishery conservation program[s]'" including the ICRW. 22 U.S.C. 1978(h)(3). The Packwood Amendment, however, applies only to actions that affect the ICRW. See 16 U.S.C. 1821(e)(2)(A).

economic sanctions. Under the Pelly Amendment, the President may, in his discretion, restrict imports of fish products from that country. 22 U.S.C. 1978(a)(4). Under the Packwood Amendment, the Secretary of State *must* reduce that foreign nation's fishery allocation in United States waters by at least 50%. 16 U.S.C. 1821 (e)(2)(B).

Only the first step of this process—the determination whether whaling activity has "diminished the effectiveness" of the ICRW—is at issue in this case. There is no dispute that, *if* the Secretary of Commerce determines that whaling activity "diminishes the effectiveness" of the ICRW, the Secretary is obligated to certify that fact. Likewise, there is no dispute that, *if* a certification is made, the President may and the Secretary of State shall impose sanctions. This case, however, focuses on the crucial antecedent issue: whether the Secretary of Commerce *must* find that a foreign nation's departure from an IWC whale harvest quota diminishes the effectiveness of the ICRW *regardless* of other relevant countervailing factors that weigh in the balance. The plain language of the Pelly and Packwood Amendments conclusively demonstrates that the Secretary of Commerce had broad discretion to consider all relevant factors in making his determination.[19]

The Pelly and Packwood Amendments unambiguously vest the Secretary with sole authority to make the "diminish the effectiveness" determination. See 22 U.S.C. 1978(a)(1) (permitting certification "[*w*]*hen*

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[19] Respondents' arguments for "an automatic, mandatory and nondiscretionary sanction" in these circumstances (Br. in Opp. 8) rely largely on materials supporting the nondiscretionary elements of the *subsequent* steps in the certification and sanctioning process. For example, they contend (Br. in Opp. 9 & n.5) that the Secretary must certify quota departures because "[t]he statute directs that the Secretary 'shall certify' offending conduct." Likewise, they argue (Br. in Opp. 11, 14-16) that the Secretary must certify quota departures because the Packwood Amendment imposes automatic sanctions. Plainly, respondents confound the three separate steps involved in the certification and sanctioning process.

the Secretary of Commerce determines" that the standard is met); 16 U.S.C. 1821(e)(2)(A)(i) (defining certification as "*a certification made by the Secretary*"). The Secretary—not the IWC, the judiciary, or respondents—is charged with the statutory responsibility for determining whether a particular whaling activity has "diminish[ed] the effectiveness" of the ICRW. Congress, in unequivocal terms, placed that decision-making authority in the head of the Executive Branch agency with responsibility for and expertise in whale conservation matters. See 16 U.S.C. 916j.[20]

This Court has long recognized that the decision-making responsibilities entrusted to the head of an Executive Branch agency "are not mere ministerial duties." *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840).[21] The Pelly and Packwood Amendments provide no excep-

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[20] Respondents level the remarkable charge that "[i]n this case, the Secretary of Commerce substituted his judgment for the IWC's" (Br. in Opp. 18). The statutory language quite plainly provides that the Secretary, not the IWC, shall determine whether whaling activities "diminish the effectiveness" of the ICRW. Respondents' contention that the IWC should dictate when our country's economic sanctions will be imposed against our allies finds no support in the statutory language. Surely, "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974); see also *id.* at 289 n.18.

[21] This Court specifically stated (*Decatur*, 39 U.S. (14 Pet.) at 515):

> The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act.

This principle has been recognized since the formation of the Union. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). See also, *e.g.*, *United States* v. *S.A. Empressa de Viacao Aerea Rio Grandesne (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 13 ("'Where there is room for policy judgment and decision there is discretion.'" (quoting *Dalehite* v. *United States*, 346 U.S. 15, 35-36 (1953)).

tion. The plain language of these statutes, instructing the Secretary to determine whether particular whaling activities "diminish the effectiveness" of the ICRW, clearly invests the Secretary with broad discretion to apply his expertise and evaluate all pertinent factors in each particular case. This language, "requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary." *Decatur*, 39 U.S. (14 Pet.) at 515-516.

Indeed, the statutory language is not only broad, but also unqualified. It does not direct the Secretary to consider any specific factors in reaching his decision. It does not instruct the Secretary that he must reach a particular conclusion in any particular case. And nowhere does it state what respondents urge—that the Secretary *must* conclude that any nation that departs from IWC quotas "diminishes the effectiveness" of the ICRW. Instead, it leaves the determination to the informed discretion of the Executive Branch officer charged with special responsibility for whale conservation and oceanic affairs.[22]

Simply put, the plain language of the Pelly and Packwood Amendments conveys an express grant of discretion to determine each case on its merits. The courts cannot redefine the term "diminish the effectiveness" to rob it of its inherently discretionary content. This Court explained the controlling principle in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958), stating:

> [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See

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[22] Congress plainly knows how to restrict an Executive Branch officer's exercise of discretion when it so desires. For example, Congress stated with great specificity the manner in which economic sanctions should be applied once a certification under the Packwood Amendment has taken place. See 16 U.S.C. 1821(e)(2)(B)-(D).

> *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *Kadrie*, 281 U.S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 62-63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

The Pelly and Packwood Amendments, leaving to the Secretary "questions of judgment requiring close analysis and nice choices" (*ibid.*), fall squarely within this description. By their plain terms, they create no "automatic, mandatory, and nondiscretionary" obligation to conclude that a nation that departs from IWC harvest quotas has "diminished the effectiveness" of the ICRW in each and every case.[23]

This grant of discretion is hardly unusual; indeed, it is a familiar practice in statutes affecting foreign relations. Congress, recognizing the preeminent role of the President in the conduct of foreign affairs and the need for flexibility in responding to international problems, traditionally delegates broad discretionary authority to the Executive Branch through the use of general terms. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-679 (1981); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936).

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[23] Indeed, this conclusion seems inescapable in light of the structure of the ICRW itself. The ICRW, by its own terms, does *not* require a member nation to comply with its harvest quotas, provided that the nation files a timely objection. See ICRW art. V, 62 Stat. 1719. In applying the Pelly and Packwood Amendments, we have maintained that the Secretary *may* nevertheless determine that noncompliance with non-mandatory quotas in particular cases "diminishes the effectiveness" the ICRW insofar as it imperils the ultimate goals of the convention. But it would be quite incongruous to maintain that the Secretary has a *mandatory* duty to conclude that *every* departure from *non-mandatory* quotas "diminishes the effectiveness" of the ICRW, regardless of magnitude and attendant circumstances.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright Export Corp.*, 299 U.S. at 324.[24] The Pelly and Packwood Amendments, relying upon an Executive Branch determination that certain whaling activities "diminish the effectiveness" of international conventions, exhibit the traditional congressional deference to executive judgment in a matter affecting foreign affairs. See, *e.g.*, *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19.

Respondents nonetheless maintain (Br. in Opp. 8) that Congress intended an "automatic, mandatory, and nondiscretionary sanction," despite the inherently discretionary content of the terms Congress used. That contention "does undue violence to the words chosen by Congress." *Regan* v. *Wald*, slip op. 12. If Congress had wished to dispense with Executive Branch judgment and impose automatic sanctions, "it could easily have done so explicitly" (*id.* at 13). Congress *could* have stated that the Secretary *must* certify any country that departs in any manner from an IWC harvest quota. But Congress did not. The words it chose reflect an unambiguous intention to rely on the Secretary's considered judgment in each individual instance. That choice should be respected.

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[24] The *Curtiss-Wright* decision provides a lengthy list of examples from its era. See 299 U.S. at 324 n.2. The list has no doubt grown in the past 50 years. One need not look far for contemporary examples—the fishery allocation provisions of the the Magnuson Fishery Conservation and Management Act, codified in the same statutory section as the Packwood Amendment, provide extremely broad criteria to guide the Secretary of State's determination of foreign fishery allocations. See 16 U.S.C. 1821(e)(1)(E).

B. The legislative history demonstrates that Congress intended the Secretary to exercise discretion in determining whether a departure from IWC harvest quotas "diminishes the effectiveness" of the ICRW

The legislative history and background of the Pelly and Packwood Amendments confirm that the Secretary has broad discretionary authority to consider all relevant factors when determining whether a departure from a conservation recommendation "diminishes the effectiveness" of the conservation program. The "diminish the effectiveness" standard, a mainstay of the United States' international conservation programs, has been incorporated into five Acts of Congress over a period of 22 years. The legislative history of these Acts—ranging from the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, through the Pelly and Packwood Amendments, to the Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. (Supp. II) 972 *et seq.*—reveals a consistent, repeated, and purposeful intention to preserve Executive Branch discretion in assessing whether quota departures undermine international conservation programs. Congress plainly employs the "diminish the effectiveness" standard to invoke the use of Executive Branch expertise and judgment in international conservation matters.

1. *The 1962 Amendments to the Tuna Conventions Act.* Congress first employed the "diminish the effectiveness" standard in the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, which instruct the Secretary of Commerce to promulgate regulations prohibiting tuna imports from countries whose nationals conduct fishing operations "in such a manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations" proposed by the Inter-American Tropical Tuna Commission. 16 U.S.C. 955(c). The legislative history and administrative implementation of these Amendments demonstrate clearly that the "diminish the effectiveness" standard was intended to give the Executive Branch broad discretion

in determining appropriate circumstances for invoking the embargo power.

The Senate Report reveals that the 1962 Amendments were drafted and proposed by the "affected agencies of the Government," including the Department of the Interior (which, at the time, exercised authority over fisheries) and the Department of State. S. Rep. 1737, 87th Cong., 2d Sess. 1, 10-11 (1962); see also H.R. Rep. 2409, 87th Cong., 2d Sess. 3 (1962). The Senate Committee specifically requested Interior to explain how the embargo provisions would be applied. Interior answered that the regulations would respond to various activities, including a foreign nation's failure to "put into effect conservation measures applicable to its own fishermen adequate for the implementation of the Commission's recommendations" (*id.* at 7). Interior explained that the regulations would be promulgated and implemented through close cooperation with the foreign governments (*id.* at 7-8). Interior expressly stated that once it had received "adequate assurances" of cooperation:

> We would bring any evidence of failure to follow through on the assurance to the attention of the government concerned. Should that government fail to take adequate action, we would institute the certification procedure in respect of tuna offered for entry from that country.

Id. at 8. Interior's statements demonstrate a clear understanding that the "diminish the effectiveness" standard would not require automatic certification of all departures from the conservation regulations; instead, Interior would first use diplomacy and negotiation to obtain "adequate assurances" of cooperation, followed by further diplomacy to obtain "adequate action" in the event the foreign country failed to "follow through" on its assurances. The implementing regulations confirm that understanding. The regulations list a number of factors that are to be taken into account, "among such other considerations as may appear to be pertinent in a particular case," in determining whether a country will

be found to have diminished the effectiveness of a conservation program. 50 C.F.R. 281.5.[25] Those regulations, first promulgated in 1966 (see 31 Fed. Reg. 16096), demonstrate a long-standing recognition that application of the "diminish the effectiveness" standard necessarily requires exercise of Executive Branch judgment and discretion.[26]

2. *The 1971 Pelly Amendment.* The Pelly Amendment was enacted in 1971 to counteract Denmark's overfishing of Atlantic salmon. As its use of the "diminish the effectiveness" standard indicates, the Pelly Amendment was patterned after the 1962 Amendments to the Tuna Conventions Act.[27] The legislative history reveals

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[25] These factors include (50 C.F.R. 281.5):

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(6) The quantity of species * * * taken from the regulatory area by the country's vessels * * * and its relationship to (i) the total quantity permitted to be taken by the vessels of all countries participating in the fishery and (ii) the quantity of the species sought to be restored to the stock of fish pursuant to the Commission's conservation recommendations.

(7) Whether or not repeated and flagrant fishing operations in the regulatory area by the vessels of the country seriously threaten the achievement of the Commission's recommendations.

[26] Thus, the court of appeals erred in interpreting the 1962 Amendments to the Tuna Conventions Act as requiring that "[i]f a foreign country failed to implement the harvest recommendations, that failure would automatically result [in] imposition of the statutory sanctions on the foreign country" (Pet. App. 28a). Neither the legislative history nor the implementing regulations support that conclusion. Indeed, the Committee specifically stated that it expected the Secretary "to implement the conservation objectives of the Commission through cooperative international efforts." S. Rep. 1737, *supra*, at 4.

[27] See also H.R. Rep. 92-468, 92d Cong., 1st Sess. 13 (1971); *Fishery Legislation: Hearings on S. 1242, et al. Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 114 (1971) [hereinafter cited as the *1971 Senate Hearings*]; *Commercial Fisheries: Hearings on H.R. 7117, et al. Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d

that Congress (and the Executive Branch) fully expected the Pelly Amendment to produce trade sanctions in response to Denmark's flagrant violations of the salmon harvest quotas established by the International Convention for the Northwest Atlantic Fisheries (ICNAF).[28] However, the legislative history does not support respondents' contention that the Pelly Amendment requires automatic certification of *every* departure from international conservation regulations. Instead, it demonstrates that Congress intended the Secretary of Commerce to exercise informed judgment in determining whether those departures "diminish the effectiveness" of other conservation programs.

The Pelly Amendment, as originally introduced, was directed solely toward protection of New England's highly prized Atlantic salmon from Denmark's ruinous high seas fishing practices. See S. Rep. 92-582, 92d Cong., 1st Sess. 3 (1971); H.R. Rep. 92-468, 92d Cong., 1st Sess. 3 (1971).[29] The legislative history describes in

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Cong., 1st Sess. 389 (1971) [hereinafter cited as the *1971 House Hearings*].

[28] The fact that Congress and the Executive Branch intended the sanctions to be available notwithstanding Denmark's formal objection to the ICNAF's quotas (see H.R. Rep. 92-468, *supra*, at 5) refutes the Japanese petitioners' contention (85-955 Pet. 20-21) that the sanctions cannot be applied to parties that file valid objections to quotas established under international conservation treaties. Congress, in recognizing treaty rights, may nevertheless attach adverse consequences to their exercise. *Moser* v. *United States*, 341 U.S. 41 (1951).

[29] The original bill provided mandatory trade sanctions if the Secretary of Commerce determined that foreign nationals were "conducting fishing operations in a manner or in such circumstances that diminish the effectiveness of domestic conservation programs of Atlantic salmon." *1971 House Hearings* 264. However, the Commerce and State Departments urged that international, rather than domestic, conservation programs should serve as the "yardstick" for the Secretary's exercise of certification authority and that any resulting sanctions should be discretionary. See H.R. Rep. 92-468, *supra*, at 5-6. In addition, they urged that the legislation "should be applied generally to international fishery conservation programs" (*id.* at 6). Congress agreed to those modifications (*ibid.*).

detail Denmark's intransigent refusal to recognize any meaningful conservation measures.[30] The Senate and House Reports observe that Denmark "refused to agree to a total ban or even a reduction in the quota to phase out their fishing and reestablish their fishermen in other areas" (S. Rep. 92-582, *supra*, at 4; H.R. Rep. 92-468, *supra*, at 5), concluding that Denmark's position would lead to "the eventual destruction of this valuable sport fish" (*ibid.*). Congress, without question, viewed Denmark's specific actions as cause for "critical concern" (S. Rep. 92-582, *supra*, at 4; H.R. Rep. 92-468, *supra*, at 6).[31]

Congress plainly determined that Denmark's catastrophic depletion of salmon stocks in flagrant defiance of the ICNAF quotas "diminished the effectiveness" of the ICNAF conservation program, a determination in which the Executive Branch concurred. See H.R. Rep. 92-468, *supra*, at 11-15. However, that determination, resting on Congress's particular findings concerning Denmark's fishing activities, cannot support an inference that every departure from any conservation quota "diminishes the effectiveness" of the underlying fisheries conservation program.[32] Rep. Pelly himself indicated that

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[30] See *1971 Senate Hearings* 45-65, 95-99, 114-116; *1971 House Hearings* 263-396; S. Rep. 92-582, *supra*, at 3-4; H.R. Rep. 92-468, *supra*, at 4-6; 117 Cong. Rec. 34750-34754, 47053-47054 (1971).

[31] See also, *e.g.*, 117 Cong. Rec. 34751 (1971) (Rep. Dingell) (Denmark's actions are "nullifying all efforts to ensure an adequate run" of salmon); *ibid.* (Rep. Pelly) (the legislation was motivated by "the severe conservation crisis which has arisen with respect to Atlantic salmon"); *id.* at 34752 (Rep. Wylie) (Denmark's overfishing "has threatened the extinction of this natural resource which Americans spend millions of dollars each year to conserve"); *id.* at 34753 (Rep. Conte) ("[t]here is an urgent need to protect stocks of Atlantic salmon from wasteful high seas fishery."); *id.* at 34754 (Rep. Clausen) (the North Atlantic salmon is "being ravished thoughtlessly and without regard for appropriate conservation measures"); *id.* at 47054 (Sen. Stevens) (unless immediate action is taken "it will be too late to save the fish and our fishing industries").

[32] The court of appeals seems to have reasoned (Pet. App. 23a) that (1) the Danish fishing activities violated the ICNAF quotas;

not every violation would merit certification, stating (117 Cong. Rec. 34752 (1971) (emphasis added)):

> While this legislation was initially prompted by the Atlantic salmon crisis, the whaling issue and the impending over-exploitation of other living marine resources prompted me to suggest to the committee that this legislation be expanded to give the President the authority to embargo fishery products *in the case of flagrant violation* of any international fishery conservation program to which the United States has committed itself.

This was not a casual statement. Rep. Pelly specifically testified in the Senate hearings that departures from fishery conservation requirements must be sufficiently serious—as in the case of the Atlantic salmon crisis—to justify certification.[33] In accordance with Rep. Pelly's

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(2) Congress determined that the Danish activities "diminished the effectiveness" of the ICNAF conservation program; and (3) therefore, any departure from quotas must necessarily "diminish the effectiveness" of fishing conservation programs. The flaws in that syllogism are obvious.

[33] Rep. Pelly stated (*1971 Senate Hearings* 47 (emphasis added)):

> No one anticipated the advent of the Danish high seas salmon fishery, and it is entirely possible that other valuable fishery resources and marine mammals may fall victim to similar sudden intensive exploitation in the future.
>
> For this reason, H.R. 3304 was substantially amended to authorize an embargo *in the case of flagrant violation* of any international fishery conservation program to which the United States has committed itself.

Likewise, Donald L. McKernan, the State Department's Special Assistant for Fisheries and Wildlife, stated (*1971 Senate Hearings* 97 (emphasis added)):

> We do not anticipate that there would be any need to invoke the proposed legislation where conservation needs are effectively met by the agreement of all nations involved to an international conservation regime.
>
> However, there are some situations where one or more nations have failed to agree to a program otherwise agreed among the involved nations, or having once agreed, failed to abide by the agreement.

statements, the Pelly Amendment provides that the Secretary of Commerce should apply his informed judgment—through the "diminish the effectiveness" provision—to assess the particular impact of the infractions at issue in each individual case.[34]

The Pelly Amendment's legislative history is equally informative in light of what it does *not* say. Although respondents rely (Br. in Opp. 6) on "the strength of this extraordinarily pointed legislative history," they cite no passage that expressly asserts what they contend—the legislative record *nowhere* states that the Secretary has an "automatic, mandatory and nondiscretionary" duty to certify each and every foreign country whose nationals depart from fishery conservation quotas. Instead, the legislative history, like the language of the statute, indicates that the Secretary of Commerce should

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> Under the proposed legislation, *if* the action of *such* countries [i.e., countries not in compliance] *diminished the effectiveness of the international fishery conservation program,* consideration would need to be given to taking trade measures as necessary to support the conservation program.

[34] Rep. Pelly plainly recognized that his Amendment conferred substantial discretion, stating that "[t]he effectiveness of this legislation will depend upon the spirit and dedication to sound conservation of the agencies and individuals responsible for its enforcement." 117 Cong. Rec. 34752 (1971). Thus, he counseled against "inaction on the part of the Secretary of Commerce or the President," stating (*ibid.*):

> We are dealing with an aspect of foreign relations, and it is unwise to tie the hands of the Executive, but the enactment of this legislation represents a clear directive from the Congress to the President that the United States will not permit foreign countries which flount [*sic*] international conservation measures to profit through continued access to the American marketplace.

In a similar vein, Rep. Wylie, a co-sponsor of the bill, noted the important role that negotiation would continue to play under the legislation. *1971 House Hearings* 285 ("whenever any nation finds its exports to our country threatened, negotiations are advocated to promulgate conservation treaties which would be in the interest of the United States and the other nations involved").

exercise informed judgment in assessing whether these departures "diminish the effectiveness" of the particular conservation program at issue.[35]

Thus, enactment of the Pelly Amendment continued the congressional policy, initiated under the 1962 Amendments to the Tuna Conventions Act, of vesting the Secretary of Commerce with discretion to determine whether departures from international fishing quotas merit certification.[36]

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[35] Respondents and the court of appeals rely on scattered passages that, when read in context, simply indicate that the Pelly Amendment (1) *authorizes* the certification of nations that depart from international fishing quotas; and (2) would result in certification of Denmark on account of its flagrant departures from the ICNAF ban. See Br. in Opp. 8-9; Pet. App. 22a-25a. These passages do not support an inference that certification is "mandatory and nondiscretionary" (Pet. App. 42a) in every case in which a nation departs from harvest quotas.

Particularly infirm is respondents' contention (Br. in Opp. 9) that certification is mandatory because "the Pelly Amendment sanctions were created for the express purpose of penalizing nations that evaded overall limits on the catch or quotas." As this Court recently stated:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. * * * Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See, *e.g.*, *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 10-11. The Pelly Amendment's plain language expressly relies on the Secretary of Commerce's judgment to determine whether particular fishing operations "diminish the effectiveness" of a fishery conservation program. It demonstrates a purposeful intent to call upon particularized Executive Branch discretion to effectuate whale conservation goals.

[36] Notably, Denmark was never certified for its Atlantic salmon fishery. Rather, the United States reached an understanding with

3. *The 1978 Amendment of the Pelly Amendment.* If there were any doubts concerning application of the Pelly Amendment's "diminish the effectiveness" standard, they were erased by subsequent amendment of that Amendment. In 1978, Congress enlarged the scope of the Pelly Amendment as part of its extension of the Fishermen's Protective Act. The 1978 legislation authorized the Secretary of Commerce and the Secretary of the Interior to certify wildlife trafficking that "diminishes the effectiveness of any international program for endangered or threatened species." 22 U.S.C. 1978(a)(2).[37] The House Committee on Merchant Marine and Fisheries—which reported the original Pelly Amendment—specifically explained the purposes of the new provision. See H.R. Rep. 95-1029, 95th Cong., 2d Sess. 8-11 (1978). Its explanation again verifies that the Secretary of Commerce is to exercise informed judgment when applying the "diminish the effectiveness" standard.

Denmark in 1972 that called for a four-year phase-out of its high seas fishing. The substance of that understanding was eventually adopted by the ICNAF. See S.A. E1-E13. The Secretary of Commerce has invoked the Pelly Amendment on a number of other occasions when he has found that departures from IWC whale harvesting quotas have "diminished the effectiveness" of the ICRW. Respondents point to these certifications as evidence that the Secretary, in the past, *always* certified every nation that departed from international quotas (Br. in Opp. 16-18). Respondents' characterizations of the Secretary's past practice are inaccurate. In all events, the court of appeals concluded that "the record does not conclusively show what that practice has been" and that the dispute "does not present a genuine issue of material issue of fact" (Pet. App. 32a n.19).

[37] The modification added a new paragraph to the Pelly Amendment that closely mirrors the original language. It provides (22 U.S.C. 1978(a)(2)):

> When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species, the Secretary making such finding shall certify such fact to the President.

The Committee cited the past use of the Pelly Amendment to certify whaling nations that "harvested sperm, fin, and minke whales well in excess of IWC quotas," noting that the Amendment had proven to be "one of our most effective tools in the effort to conserve the world's greatest whales." H.R. Rep. 95-1029, *supra*, at 9.[38] The Committee observed that the proposed modifications could "expand the success the United States achieved in the conservation of whales to the conservation of endangered and threatened species" (*ibid.*). The Committee specifically addressed the "diminish the effectiveness" standard, stating (*id.* at 15):

> The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.[39]

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[38] The Committee implicitly recognized that the Secretary exercised a substantial amount of discretion in determining whether the taking of whales in excess of harvest quotas "diminished the effectiveness" of the international convention, stating (H.R. Rep. 95-1029, *supra*, at 9 (emphasis added)):

> In November, 1977 the Secretary of Commerce reported to the President that two non-members of the IWC—Peru and Korea —were taking whales in excess of IWC quotas. In March 1978, the Secretary of Commerce reported to the subcommittee that *although these nations are violating IWC quotas*, certification under the Pelly amendment is pending a thorough documentation and substantiation of each action that may diminish the effectiveness of the IWC conservation regime.

On December 14, 1978, the Secretary of Commerce certified Peru, Chile, and Korea "based on the fact that those countries are not members of the IWC and their nationals harvest whales substantially in excess of IWC quotas established to protect whales from overharvesting." See Letter from the Secretary of Commerce to the President (J.A. 177).

[39] Remarkably, the court of appeals dismissed this statement as irrelevant, concluding that the phrase "diminish the effectiveness"

The legislative history of the 1978 modifications to the Pelly Amendment thus reiterates the well-established congressional understanding that the Secretary of Commerce

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has a different meaning depending on whether it is applied to endangered species treaties or fishery-related treaties (Pet. App. 38a-39a). It based this distinction, which it admitted might appear "overly formalistic" (*id.* at 39a), upon a mistaken understanding of the central endangered species treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087. The court stated (Pet. App. 39a) that the Convention "operates in a manner entirely different from that of [*sic*] original Pelly Amendment." Whatever that statement means, it is clear that CITES *does* operate in a manner essentially identical to the fishing and whaling conventions. And contrary to the court's statement, CITES *does* provide for generally applicable regulations that are adopted through procedures substantially identical to those employed in the ICRW.

CITES regulates trade in endangered and threatened species through inclusion of those species in Appendix I (covering endangered species) and Appendix II (covering threatened species). CITES arts. II-IV, 27 U.S.T. at 1092-1097. Compare ICRW art. V, 62 Stat. 1718-1719 (regulating whaling through the use of a Schedule). CITES requires a two-thirds majority vote to amend an Appendix to include additional species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. III, 62 Stat. 1717 (requiring a three-fourths majority vote to amend the Schedule). A nation may object to inclusion of a species within an Appendix; if it timely objects, it is expressly exempted from compliance with the CITES requirements governing import and export of that species. CITES art. XV, 27 U.S.T. at 1110-1112. Compare ICRW art. V, 62 Stat. 1719 (containing an analogous exemption provision). Thus, a nation that objects to the inclusion of a particular species within a CITES Appendix and then, for example, allows trade without the import and export permits required by CITES, is in the same position as a nation that objects to an IWC Schedule amendment and permits whaling in contravention of its requirements.

The court of appeals not only misunderstood CITES; it also failed to recognize that future endangered species treaties might impose specific quotas in the same manner as the ICRW. There is no indication in the legislative history that Congress intended the phrase "diminish the effectiveness" to be applied mechanically with respect to departures from fishing quotas, but to be applied flexibly with respect to departures from endangered species quotas. It strains credulity to believe that Congress intended to single phrase to have such significantly different meanings in two adjoining para-

(and the Secretary of the Interior) must be free to exercise informed judgment in applying the "diminish the effectiveness" standard. Plainly, this legislation, like the 1962 Amendments to the Tuna Conventions Act and the original 1971 Pelly Amendment, does not contemplate the mechanical rule that respondents now urge.

4. *The 1979 Packwood Amendment.* One year later, Congress enacted the Packwood Amendment, once again employing the "diminish the effectiveness" standard in a statute addressing an international conservation program. The Packwood Amendment provides that the Secretary of State must impose a severe economic sanction—a reduction, by at least 50%, of the foreign nation's fishery allocation in the United States fishery conservation zone—against any country whose nationals conduct whaling operations in a manner that, the Secretary of Commerce determines, "diminishes the effectiveness" of the ICRW. 16 U.S.C. 1821(e)(2). The legislative history of the Packwood Amendment, although rather limited, once again demonstrates that Congress intended the Secretary of Commerce to exercise informed judgment in applying that standard.

The Packwood Amendment was introduced on the Senate floor; thus, it did not receive explication in a legislative report.[40] The debates were relatively short. Sen.

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graphs of the same statutory subsection. See, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 9; *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983).

[40] Sen. Packwood originally proposed legislation providing that no permit to fish in the conservation zone "may be issued to any vessel of any nation certified by the Secretary of Commerce under the provisions of [the Pelly Amendment]." S. 917, 96th Cong., 1st Sess. § 3 (1979); see S. Rep. 96-72, 96th Cong., 1st Sess. 6 (1979); 125 Cong. Rec. 8951 (1979). The Senate adopted that proposal (*id.* at 8952); however, it was deleted in the House bill (*id.* at 16432). The House Committee on Merchant Marine and Fisheries—which one year before had drafted the modification to the Pelly Amendment—and the Senate Committee on Commerce, Science and Transportation later concurred in a compromise bill, agreeing "to retain, but rewrite, the Packwood Amendment" in the form that was ulti-

Packwood described the purpose of the legislation as follows (125 Cong. Rec. 21742 (1979)):

> The core of the [Packwood Amendment] is simply that any foreign country which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.

This statement, as well as other floor comments, indicates the sponsors' general intent to put additional "economic teeth into our whale conservation efforts" (*ibid.*).

Congress plainly intended the Packwood Amendment to retain the same "diminish the effectiveness" standard utilized in the Pelly Amendment. Congress used the same language in both amendments; furthermore, the Packwood Amendment expressly refers to the Pelly Amendment's certification procedures. See 16 U.S.C. 1821(e)(2)(A)(i). As Rep. Breaux explained, the Packwood Amendment simply provides "a new sanction for the Secretary of State to utilize once a nation is certified as diminishing the effectiveness of the International Whaling Convention." 125 Cong. Rec. 22083 (1979).[41] Thus, in light of our foregoing discussion of the Pelly Amendment and related statutes, it naturally follows that Congress

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mately passed (*id.* at 22082) (Rep. Murphy). Thus, there was no need for a conference report (*ibid.*). Although the Amendment bears Sen. Packwood's name, Rep. Murphy apparently was the author of the compromise language (*id.* at 22082-22083).

[41] Other floor statements confirm that the Packwood Amendment did not alter the Secretary's certification discretion. See 125 Cong. Rec. 21743 (1979) (Sen. Magnuson) ("This amendment is a significant addition to the sanctions presently available under the Pelly Amendment."); *id.* at 22083 (Rep. Oberstar) ("[T]his authorization links the FCMA to certification under the Pelly Amendment."); *id.* at 22084 (Rep. Oberstar) ("In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification."). The court of appeals agreed that the same certification standards apply under both amendments (Pet. App. 18a-21a).

intended to continue reliance on the Secretary's informed judgment to determine whether nations that depart from IWC harvest quotas should be certified.

Respondents nonetheless urge that the Secretary is required to certify automatically every departure from any IWC quota, asserting that "Congress intended reduced fishing rights in the U.S. Fishery Conservation Zone to be an automatic, mandatory and nondiscretionary sanction against any nation that intentionally allowed its nationals to violate IWC whaling quotas" (Br. in Opp. 8). However, respondents have produced no express authoritative statements of legislative intent to support that contention. Instead, they rely on a "common understanding" drawn from general statements in the floor debates, failing to distinguish between the inherently discretionary certification standard and the mandatory penalty that follows certification (*id.* at 10-11, 14-16).[42]

The floor debates contain a number of general statements—like that of Senator Packwood, quoted above—suggesting that the Packwood Amendment would provide new sanctions against foreign nations that "disregard," act "contrary to," or "violate" the ICRW and the resulting IWC regulations.[43] Congress plainly expected—quite

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[42] Respondents argue (Br. in Opp. 11) that "Congress did not mean to import by the back door into [the Packwood Amendment] certification the very same discretion it intended to remove when it tightened up Pelly's sanctions provision." However, Congress could reasonably conclude that the Secretary should continue to have broad discretion in determining whether whaling operations "diminish the effectiveness" of the ICRW, but further conclude that once the Secretary makes that determination, sanctions must be imposed. Indeed, Congress did just that. See note 46, *infra*.

[43] See 125 Cong. Rec. 21743 (1979) (Sen. Packwood) (the legislation "will prohibit those nations which violate the conservation regulations * * * from fishing within our 200-mile zone"); *ibid.* (Sen. Magnuson) ("if a foreign country is certified by the Secretary of Commerce for violating or diminishing the effectiveness of international whaling regulations * * * then that nation will be denied access to fish in our 200-mile fishery conservation zone"); *id.* at 22082-22083 (Rep. Murphy) ("any nation which the Secretary of Commerce has certified as being in violation of the IWC" will be

rightly in our view—that the Amendment would provide invaluable aid in "end[ing] the unnecessary and reckless violations of that agreement, and the irresponsible destruction of whales." 125 Cong. Rec. 22083 (1979) (Rep. Oberstar).[44] However, these broad aspirational statements, addressed to the undisputed general purpose of the legislation, do not shed light on the specific question at issue in this case. *None* of these statements purports to define the "diminish the effectiveness" standard. *None* of these statements expressly proclaims that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify every violation of an IWC harvest quota. Instead, these statements simply demonstrate congressional agreement that departures from IWC regulations will—*as a general matter*—justify certification. They do not restrict the discretionary import of the "diminish the effectiveness" standard.[45]

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subject to sanction); *id.* at 22083 (Rep. Oberstar) ("the United States intends to enforce the [ICRW] and to end the unnecessary and reckless violations of that agreement"); *ibid.* (the Secretary of Commerce certifies a nation "found to have acted in a manner contrary to international agreements").

[44] Congress was particularly concerned by the emergence of "outlaw whaling"—whaling conducted by pirate ships that operate completely outside the ICRW regime. These ships paid no attention whatsoever to conservation regulations adopted by the IWC. See *Outlaw Whaling: Hearing on Whaling Operations Conducted Outside the Control of the International Whaling Commission Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. (1979).

[45] As we have previously observed (note 35, *supra*), broad statements directed to the general purposes of the statute cannot alter plain language. Likewise, they cannot define the content of particular statutory terms. This Court explained that principle in *Regan* v. *Wald*, No. 83-436 (June 28, 1984), stating (slip op. 14):

> Oral testimony of witnesses and Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies * * * would open the door to the inadvertent, or perhaps even

Indeed, the only floor statement specifically directed to application of the certification standard *supports* the Secretary's exercise of discretion. Rep. Breaux—who, as chairman of the House subcommittee that had primary responsibility for the legislation, necessarily understood the operation of the certification process—emphasized the discretionary content of the certification standard, stating, "I trust that the Secretary of Commerce will be especially careful to examine all the facts surrounding a possible certification if this law is enacted since a certification from this point on can have disastrous effects on our U.S. fishing industry." 125 Cong. Rec. 22083 (1979) (referring to possible retaliatory embargos against United States fish exports).[46]

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planned, undermining of the language actually voted on by Congress and signed into law by the President.

The floor statements in this case fall far short of the necessary direction and precision to alter the meaning of a familiar statutory term. Furthermore, President Carter, in signing the Packwood Amendment into law, plainly recognized that certification would require the exercise of judgment, stating:

> With regard to both the Packwood[] and Pelly amendments, the Secretaries of Commerce and the Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation.

2 Public Papers of the President 1435 (1979) (Administration of Jimmy Carter). Finally, we note that the Packwood Amendment's language was the product of compromise (see 125 Cong. Rec. 22082-22083 (1979)); hence, this Court should be chary of relying on the statements of individual congressmen, in lieu of the statutory language, to determine congressional intent. See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. See also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982).

[46] Rep. Breaux correctly explained the discretionary nature of the certification process in subcommittee hearings concerning the Packwood Amendment, stating (emphasis added):

> I understand under the Pelly amendment, as it exists, there are really two areas in which there are optional actions that can be taken by the administration.
>
> First, in certifying that a country is in violation of some international agreement, ***and there is a lot of flexibility in that***

In sum, the Packwood Amendment, like the three Acts of Congress that preceded it, plainly contemplated that

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certification and, second, after a nation is certified, there is still discretion in determining whether a ban on imports of that country's products will be in fact imposed against that country. Therefore, under Pelly we have two discretionary features, whereas in the Packwood amendment, *you are really taking all of the discretionary features and putting them into their first category which is the certification of a nation being in violation of an international agreement.*

Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 314-315 (1979) [hereinafter cited as the *June 26, 1979 House Hearings*]. Respondents mistakenly suggest (Br. in Opp. 11-12) that Rep. Breaux had a contrary understanding of the Pelly Amendment, relying on his statements nearly one month earlier in oversight hearings on whaling. *Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. Pt. 1 (1979) [hereinafter cited as the *June 4, 1979 House Hearings*]. Plainly, Rep. Breaux's later statements, based on a more thorough examination of the statutes and directed specifically to the Packwood Amendment, give a better picture of his understanding. In all events, his statements in both hearings are consistent. In the June 4, 1979 Hearings, Rep. Breaux asked Richard Frank, Administrator of the National Oceanic and Atmospheric Administration, if the Pelly Amendment would apply to certain whaling activities. Mr. Frank responded in part (*id.* at 312 (emphasis added)):

> If a country were violating something in the schedule, for example, taking more whales than the schedule provides, *and that were a significant violation*, I believe it is clear that the Pelly Amendment would apply.

Rep. Breaux later summarized Mr. Frank's testimony to other witnesses as follows (*id.* at 359):

> Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision. Then you get into two other categories, not supplying enough data and the importation of whale meat. They say they have some problems certifying that as a violation.

Thus, Rep. Breaux's summary statement plainly referred only to takings that the Secretary considered significant.

the Secretary of Commerce would continue to apply informed judgment in exercising its certification authority.

5. *The 1984 Pacific Tuna Licensing Act.* The passage of the Packwood Amendment did not mark the last time that Congress conferred Executive Branch discretion through the "diminish the effectiveness" standard. Just two years ago, Congress employed this standard in the Eastern Pacific Tuna Licensing Act of 1984 (EPTLA), 16 U.S.C. (Supp. II) 972 *et seq.*, to govern whether American fishing boats, seized by foreign nations for violation of the Eastern Pacific Ocean Tuna Fishing Agreement, are entitled to compensation under the Fishermen's Protective Act of 1967, 22 U.S.C. 1971 *et seq.* The legislative history of the EPTLA reveals that Congress has once again used the "diminish the effectiveness" standard to authorize the exercise of informed judgment.

The Eastern Pacific Ocean Tuna Fishing Agreement provides "an international licensing arrangement for tuna fishing in a broad area of the eastern Pacific Ocean," that also permits "conservation measures under specified circumstances." S. Exec. Rep. 98-13, 98th Cong., 1st Sess. 1 (1983). See S. Treaty Doc. 98-3, 98th Cong., 1st Sess. 3 (1983). The EPTLA, in implementing the Agreement, specifies that U.S. vessels lawfully seized by a member country for a violation of the agreement or accompanying regulations are ineligible for compensation under the Fishermen's Protective Act unless the Secretary of State determines that the violation "is not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. (Supp. II) 972c. This provision thus ensures that the Secretary of State can exercise informed discretion in determining whether American fishermen who violate an international agreement can nevertheless receive federal benefits that would otherwise be unavailable.

This statute demonstrates, once again, a clear congressional understanding that not all departures from an international agreement necessarily "diminish" its "effectiveness." Furthermore, it again corroborates that Congress has employed the "diminish the effectiveness" standard in this field as a term of art, authorizing the Execu-

tive Branch to exercise informed judgment that will take into account the nature and seriousness of the particular conduct in question.[47] Concomitantly, this statute, while enacted after the Pelly and Packwood Amendments, provides yet another illustration of the inherently discretionary content of the "diminish the effectiveness" standard.[48]

Thus, the legislative history of the "diminish the effectiveness" standard, from its genesis in the 1962 Amendments to the Tuna Conventions Act, to its most recent use in the EPTLA, demonstrates a consistent congressional understanding that the standard provides the Executive Branch with broad discretion—and, indeed, the important responsibility—to evaluate the nature, seriousness, and circumstances of departures from international conservation programs. The legislative history nowhere contains an express authoritative pronounce-

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[47] This legislation was reported by the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce, Science, and Transportation, the same committees that considered the Pelly and Packwood Amendments. The House Report specifically recognized the Secretary's broad discretion, stating:

> It is the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the [Agreement] the seriousness of a violation of a conservation regulation would need to be determined by the Secretary.

H.R. Rep. 98-721, 98th Cong., 2d Sess. 5 (1984). Notably, the Committee suggested that only a direct violation of the licensing provisions—which are specified *by the Agreement itself* (art. IV, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 3)—would, of necessity, "diminish the effectiveness" of the Agreement. The Committee indicated that violations of conservation regulations—which, like the IWC harvest quotas, are promulgated by agreement of an implementing commission (art. III, *reprinted in* S. Treaty Doc. 98-3, *supra*, at 2-3)—would be left to the Secretary's discretion.

[48] See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983) ("the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat greater caution and deliberation, to seek consistency in the interpretation of an area of law at any given time").

ment that the Secretary has an "automatic, mandatory, and nondiscretionary" duty to certify all departures from IWC whale harvesting quotas. To the contrary, it obviously contemplates that negotiation and diplomacy will not be wholly displaced by a regime of automatic sanctions.

C. Even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes

It is our position that the plain language of the Pelly and Packwood Amendments, supplemented by the legislative history, conclusively establishes that the Secretary may exercise informed judgment in determining whether a departure from an IWC whale harvest quota "diminishes the effectiveness" of the ICRW. But even if there were any doubt, the Secretary's reasonable construction of these statutes should control.

This Court has repeatedly admonished:

> If * * * Congress has not addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative determination. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. *NDRC*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnote omitted).[49] The foregoing discussion demonstrates at the very minimum that Congress did not have a clear and specific intent that the Secretary must certify every departure from IWC quotas.

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[49] See also, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9 ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9 (The "view of the agency charged with administering the statute is entitled to considerable deference * * *.").

The Secretary's construction of the Pelly and Packwood Amendments should therefore be accepted because it plainly represents a "reasonable interpretation" (*id.* at 6) of the statutory scheme that he is charged to administer.

Indeed, this principle has special force when the statute is directed to the conduct of foreign affairs and therefore intersects with an area where Executive discretion and authority are at their zenith under the constitutional scheme. See *Curtiss-Wright Export Corp.*, 299 U.S. at 319. Few international problems are susceptible to neat and simple solutions, and the international conservation of whales is no exception. The conservation efforts frequently involve difficult scientific issues, projections of incomplete empirical data, and delicate cross-cultural controversies. These complexities can only be addressed through the exercise of informed judgment and careful discretion; they cannot be resolved through blind adherence to mechanical formulae. As already discussed, the Pelly and Packwood Amendments, by their plain terms and their legislative history, require informed exercise of the discretion necessary to address these difficult challenges. The Secretary of Commerce quite reasonably interprets those statutes to permit consideration of all relevant factors in the certification decision.

The present case persuasively illustrates the reasonableness of the Secretary's interpretation. The United States, through concerted efforts over the past decade, has convinced the IWC to reduce whale harvest quotas and, ultimately, to adopt a worldwide moratorium on commercial whaling. These achievements are of little moment, however, absent compliance by Japan, the world's foremost whaling nation. Japan, an island country historically and culturally committed to whaling, lodged an objection to the IWC resolutions and thereby exempted itself, under the express terms of the ICRW, from compliance. The United States, through extensive diplomatic efforts, nonetheless convinced that country to accept the moratorium and dismantle its commercial

whaling industry in exchange for a transition period of limited additional whaling.

This executive agreement, viewed from any reasonable perspective, represents a dramatic success. As Japan's Charge d'Affaires stated (Pet. App. 103a), the agreement "avoid[s] a confrontation between our two countries" while "minimizing the economic and social hardship of those who are engaged in commercial sperm whaling." But more importantly for purposes of the Pelly and Packwood Amendments, the agreement furthers the ultimate goals of whale conservation. The agreement, *for the first time*, achieves a voluntary pledge from the world's premier whaling nation, to dismantle its commercial whaling industry in exchange for a short-term continuance of limited whaling. The Secretary of Commerce quite rightly concluded that this result does not "diminish the effectiveness" of the ICRW.[50]

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[50] That conclusion is difficult to dispute. As the Secretary explained:

> Japan is by far the most significant of the few remaining whaling nations. Not only do Japanese whalers account for the largest share of all whales harvested on a global basis, but Japan provides the export market for many of the whales harvested by nationals of other countries, including the Soviet Union. I believe that a cessation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development.

Affidavit of Malcolm Baldrige, Addendum III, *infra*, 6a-7a (J.A. 110). Japan's temporary and limited continuance of commercial whaling is a prudent price to pay in exchange. The Secretary, upon review of the IWC Scientific Committee reports and consultation with the United States Whaling Commissioner, reasonably concluded that, even allowing for the possibility of substantial error in whale population estimates, Japan's limited short-term whale harvests would not pose a significant threat to the affected species. Affidavit of Malcolm Baldrige, Addendum III, *infra*, 4a-9a (J.A. 107-113). The Department of Commerce reports that there are presently 982,200 sperm whales worldwide, and approximately 198,000 sperm whales in the North Pacific Western Division Stock. See U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972* at App. Table 11 (June

Respondents, of course, disagree. They posit a simplistic and dangerous foreign policy, arguing (Br. in Opp. 18) that the Secretary of Commerce cannot "substitute his judgment for the IWC's." They maintain that the United States, armed with the Pelly and Packwood Amendments, is obligated to forswear diplomacy and immediately certify any departure from IWC harvest quotas. Respondents seemingly are confident that if the United States swings its cudgel, Japan will unconditionally submit.[51]

This naive approach to foreign affairs, advanced by politically unaccountable entities, is facially infirm. And even if it were tenable, it does not reflect congressional policy or diminish the reasonableness of the Secretary's position. The Secretary determined, based upon his expert knowledge of the United States' international conservation efforts and his direct dealings with Japan, that the executive agreement provides the best method for advancing the goals of the ICRW. This Court should defer to the reasonable views of the Executive Branch, "the Nation's organ for foreign affairs." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). See also, *e.g.*, *Haig* v. *Agee*, 453 U.S. at 291; *Curtiss-Wright Export Corp.*, 299 U.S. at 307, 319.

Our whale conservation efforts require the type of international diplomacy applied in this case. The Executive Branch must be able to apply its special knowledge

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1985). The Department also reports that there are approximately 315,800 minke whales and 30,200 Bryde's whales worldwide (*ibid.*).

[51] In testimony before Congress, respondents expressed their views in particularly belligerent terms. They characterized the executive agreement as a "craven act" and a "sell-out," charging that the United States "capitulated" to Japanese "bullying." *1985 Hearings* 13 (testimony of Craig Van Note, Executive Vice President of Monitor, Inc.). They urged that Japan could not be trusted (*id.* at 14, 17-19) and warned that the "bilateral deal with Japan has opened a Pandora's box by demonstrating weakness" (*id.* at 21). They confidently stated that "Japan practices bluff and bluster in its dealings with other nations, but it can ill-afford a trade war with the United States" (*id.* at 15).

of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW. A strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts. Additionally, it may result in certification of countries that depart from IWC requirements that the United States itself considers unreasonable.[52] Indeed, respondents' position might also cast a shadow over application of the Pelly Amendment to other international conservation programs, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* Mar. 2, 1973, 27 U.S.T. 1087.[53] Their position would seemingly require certification of foreign countries in every instance in which they permit endangered species trade proscribed by CITES, regardless of the impact of

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[52] For example, the United States, in the face of foreign objections, has long supported the right of Alaskan and Greenland natives to take each year—for subsistence purposes—a limited number of the world's most endangered whale species, including the bowhead whale, which numbers approximately 3,800 animals. See U.S. Dep't of Commerce, *Annual Report 1984/85: Marine Mammal Protection Act of 1972*, at 28-29 & App. Table 11 (June 1985). See also *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978). If the IWC voted to prohibit all aboriginal subsistence whaling of these species, both Alaskan and Greenland natives would be affected. The United States and Denmark (on behalf of Greenland) might conceivably enter objections if they concluded that the prohibition was unnecessary. Under the court of appeals' construction, the United States would be required to certify Denmark even as it permitted its own natives to continue their traditional activity.

[53] CITES represents a broad conservation effort, supported by 82 signatory nations, controlling international trade in more than 1,000 species from marine, freshwater, and terrestrial environments. As previously noted (see note 39, *supra*), a nation that lodges a reservation to the placement of a particular species on Appendix I (endangered) or Appendix II (threatened) and permits trade in that species without the required import and export permits is in the same position as a nation that objects to an IWC amendment of the ICRW Schedule and permits whaling in contravention of it.

that trade on the species or on the effectiveness of the treaty.[54]

Thus, we submit that the plain language and legislative history of the Pelly and Packwood Amendments, which fully support the Secretary's interpretation, are fortified still further by established principles of judicial deference. The Secretary may properly conclude that a foreign nation that departs in a limited way from IWC harvest quotas, but nevertheless enters into a binding agreement with the United States to drop its objections and terminate its commercial whaling activities by April 1, 1988, has not "diminished the effectiveness" of the ICRW.

II. THE COURT'S USE OF MANDAMUS WAS INAPPROPRIATE IN THIS CASE

The court of appeals, concluding (Pet. App. 42a) that the Secretary of Commerce has "a mandatory and nondiscretionary" duty under the Pelly and Packwood Amendments to certify Japan, affirmed the district court's issuance of a writ of mandamus. See 28 U.S.C. 1361.[55] Because the Secretary's obligations are discretionary, mandamus is plainly inappropriate. Furthermore, even

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[54] We suspect that few nations—whether importers or exporters of wildlife—have CITES records so unblemished that they are free from the possibility of sanctions under an automatic certification requirement. Certainly, Congress did not intend the Executive Branch to wage economic warfare upon the world community, imposing in terrorem sanctions against every CITES transgression, regardless of circumstances. Respondents downplay this problem, noting (Br. in Opp. 14 n.8) that the Pelly Amendment permits the President to withhold sanctions. But it is obviously unsound to suggest in this area of great sensitivity that there is no harm in treating discretionary duties as mandatory, because the exercise of other forms of discretion can cure any untoward consequences. Moreover, certification of all CITES violations, both great and small, would remove practical as well as symbolic significance from the certification process.

[55] Section 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency to perform a duty owed to the plaintiff.

if the Secretary did have a nondiscretionary duty to certify Japan, mandamus would be inappropriate in this case.[56]

"The common law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 13.[57] Since the Pelly and Packwood Amendments instruct the Secretary of Commerce to exercise informed judgment, a plaintiff cannot compel certification through mandamus.

But even if the Secretary's duty were nondiscretionary, mandamus would still be inappropriate in this case. First, it is highly doubtful that the Pelly and Packwood Amendments create any "duty owed to" respondents. 28 U.S.C. 1361.[58] And even if they do, mandamus neverthe-

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[56] Since the district court lacked jurisdiction under the mandamus statute, there is no need for this Court to address the constitutional issues of justiciability raised in Judge Oberdorfer's dissent (Pet. App. 49a-52a).

[57] See, *e.g.*, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937); *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218-221 (1930); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840). Respondents state (Br. in Opp. 20) that "the justiciability of the execution by the Executive Branch of the laws of the United States has been beyond question since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)." However, *Marbury* itself states that where "the heads of departments * * * act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable." 5 U.S. (1 Cranch) at 166.

[58] The Pelly and Packwood Amendments authorize the Executive Branch to take certain actions in response to the international activities of foreign nationals. They do not create governmental duties owed to any particular domestic plaintiff. Furthermore, respondents do not have any readily identifiable legal interest in the subject matter of this suit—free-roaming whales that inhabit international waters. There is no basis for concluding that Congress intended the mandamus statute to create a mechanism for any one of the thousands of persons interested in the long-term well-being of whales to compel severe economic sanctions against foreign governments. Cf. *Federal Election Comm'n* v. *National*

less remains a remedy that "is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955). This Court recently emphasized that courts exercising their equitable powers "should pay particular regard for the public consequences in employing [an] extraordinary remedy." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). See also *Sampson* v. *Murray*, 415 U.S. 61, 83-84 (1974). As Judge Oberdorfer's dissent explains (Pet. App. 55a), the institutional and equitable considerations surrounding Executive Branch judgment in foreign affairs offer strong counsel against the use of mandamus in this case.

In particular, this Court has repeatedly stated that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). The Court has explained this "classical deference" (*Wald*, slip op. 19) as follows:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate and complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which have long been held to belong in the domain of political power not subject to judicial inquiry or intrusion.

Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. at 111.[59]

Conservative Political Action Committee, No. 83-1032 (Mar. 18, 1985), slip op. 6-7.

[59] See, *e.g.*, *Haig* v. *Agee*, 453 U.S. at 291; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (1963); *Johnson*

In the present case, judicial intervention through mandamus would result in imposition of severe economic sanctions against Japan, an important ally and trading partner, without any firm assurances that the sanctions will advance the cause of whale conservation. Japan may cease whaling; on the other hand, it may decide to cease its cooperation with non-whaling nations, completely ignore the IWC quotas, and perhaps even take retaliatory trade actions of its own. The Executive Branch is best situated to deal with this delicate matter.

Furthermore, a mandamus order requiring certification would effectively amount to judicial repudiation of a solemn agreement between nations—already partially performed—that prevents a confrontation among allies, that rests upon a wholly reasonable construction of the Pelly and Packwood Amendments, and that advances the underlying purposes of those statutes. Japan could conceivably charge that repudiation of that agreement violates international law.[60] This Court should hesitate to

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v. *Eisentrager*, 339 U.S. 763, 789 (1950); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918).

[60] Japan might claim that the United States should be bound by its agreement regardless of a subsequent judicial determination that the agreement is inconsistent with domestic law. For example, Article 46 of the Vienna Convention on the Law of Treaties provides:

> 1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.

See S. Exec. L, 92d Cong., 1st Sess. 24 (1971). The United States has not ratified this Convention. However, the State Department stated in 1971 that the Convention is generally recognized as the authoritative guide to current treaty law and practice (*id.* at 1). See generally Restatement (Revised) of Foreign Relations Law of the United States Pt. III (Tent. Draft No. 1 1980).

take actions that might ultimately precipitate international legal disputes. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963).

Finally we note that the use of mandamus in this context could have repercussions beyond the realm of wildlife conservation. Congress has adopted other measures that authorize sanctions against foreign nations based on Executive Branch application of generally phrased standards.[61] Similar judicial intervention under those statutes, compelling the Executive Branch to take foreign relations actions based on finespun judicial definitions of "mandatory and nondiscretionary" duties, would inevitably inject the Judicial Branch into the conduct of foreign policy—an area traditionally entrusted to the President and Congress. Foreign nations would justifiably doubt the United States' ability to resolve international disputes through diplomacy and compromise, free from judicial intervention.

In sum, the Secretary plainly acted within his authority in refusing to certify Japan under the Pelly and Packwood Amendments. Judicial rejection of that decision, and the consequent repudiation of a resulting executive agreement between the United States and Japan, would be a grave blow to both whale conservation and international cooperation.

CONCLUSION

The judgment of the court of appeals should be reversed.

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[61] See, *e.g.*, 22 U.S.C. 2151n (providing for the cessation of aid to governments that engage in "gross violations of internationally recognized human rights").

Respectfully submitted.

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ADDENDUM I

STATUTES INVOLVED

1. Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment) provides in relevant part (22 U.S.C. 1978(a)):

> (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
>
> * * * * *
>
> (4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) * * * from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment) provides in relevant part (16 U.S.C. 1821(e)(2)):

> (A) For the purposes of this paragraph—
>
> (i) The term "certification" means a certification made by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of title 22.
>
> (ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) that—

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period; shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

ADDENDUM II

Report of the Scientific Committee
International Whaling Commission
IWC/36/4 1984

* * * * *

10.1.1.7 Japanese Commissioner's request

At the last Commission meeting, the Japanese Commissioner had requested that the Committee consider whether the present size of catch from [the North Pacific Western Division sperm whale stock] had any significant effect on the population.

Although it had been unable to recommend a classification or catch limit for this stock, the Committee agreed that the evidence on the likely range of current stock levels discussed above was sufficient for it to provide advice on this matter.

The Committee agreed that, if continued for a short period (possibly up to 5 years), catches in line with the current catch limit of 400 would have only a small effect on the stock in the short term. The Committee was unable to agree on what the long term effect on the stock of such catches might be.

Should catching at the current level continue for a longer period, the Committee agreed that neither the short nor long term effects on the stock could be predicted on the basis of current information. To provide advice in this case, the Committee agreed that more reliable estimates of current stock size and the biological state of the stock were essential, as well as continuous stock monitoring.

An important first step along these lines was agreed to be a comprehensive sightings survey in the western North Pacific stock area. This could be carried out as an [International Decade for Cetacean Research] program.

* * * * *

ADDENDUM III

Affidavit of Malcolm Baldrige

January 14, 1985

(J.A. 107-113)

I, Malcolm Baldrige, first having been sworn, state as follows:

1. I am the Secretary of Commerce of the United States. As such, I am the Federal official responsible for "certifying" certain facts pursuant to the Pelly Amendment to the Fishermen's Protective Act and the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act.

2. I am aware of the issues involved in this litigation and was involved in the exchange of letters referred to in the First Amended Complaint. Throughout the development of the text of those letters and the related Summary of Discussions between Dr. John V. Byrne, United States Commissioner to the International Whaling Commission, and Mr. Hiroya Sano, Director General of the Fisheries Agency of Japan, I was advised daily by Dr. Byrne of the progress of the negotiations, and I met once with Mr. Sano. In my judgment, the exchange of letters reflects the best way to achieve Japanese compliance with the Schedule to the International Convention for the Regulation of Whaling 1946 (the Convention), particularly paragraph 10(e) of the Schedule, which provides for a cessation of all commercial whaling beginning with the 1985/86 pelagic season and with the 1986 coastal whaling season.

3. As stated in my letter of November 13, 1984, to Mr. Yasushi Murazumi, Charge d'Affaires ad interim of Japan, I have determined that Japanese commercial whaling consistent with Mr. Murazumi's letter to me of November 13, 1984 and with the Summary of Discussions

attached to that letter would not diminish the effectiveness of the Convention or its conservation program within the meaning of the Pelly and Packwood-Magnuson Amendments. In reaching that determination on November 13, I took into account all the relevant facts and circumstances as they then existed, including the following:

a. At its annual meeting in 1981 the International Whaling Commission ("IWC") adopted Footnote 1 to Table 3 to the Schedule, stating that no harvest was authorized from the Western Division of the North Pacific stock of sperm whales until the IWC expressly provided otherwise. As permitted by Article V, Paragraph 3 of the Convention, the Government of Japan filed a timely objection to Footnote 1 on November 9, 1981, with the legal result that Japan was not bound by the Convention to refrain from harvesting North Pacific sperm whales, and no catch limit applied under the Convention to Japanese harvests from that stock.

b. Before Japanese nationals would have taken North Pacific sperm whales under Japan's objection to Footnote 1, the IWC further amended Table 3 at its annual meeting in 1982, by adopting Footnote 2, establishing catch limits of 450 and 400 whales in the 1982 and 1983 coastal seasons, respectively. The effect of Footnote 2 lapsed by its own terms after the 1983 coastal sperm whaling season in early 1984. As of the beginning of the 1984 coastal season, therefore, Footnote 1 applied and no taking of sperm whales was authorized by the Schedule. The Japanese, however, were entitled under international law to take sperm whales without limit from this stock, pursuant to their 1981 objection.

c. At its annual meeting in Buenos Aires, Argentina in June 1984, the IWC took no action to further amend Table 3 to the schedule, and no proposed amendment was presented to or voted upon by the

Commissioners in their plenary session. However, the report of the Scientific Committee with respect to this stock indicated that further harvests for up to five years in numbers like those set forth in Footnote 2 have only a small effect on the status and trend of the stock in the short term. The Committee was unable to agree on the long term effects.

d. At its annual meeting in 1982, the IWC also adopted paragraph 10(e) of the Schedule, often referred to as the "moratorium" or "cessation". Paragraph 10(e) provides:

> "Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits."

Japan, Peru, the Soviet Union and Norway all filed timely objections to the provisions of paragraph 10(e) as adopted by the IWC in 1982. (Peru subsequently withdrew its objection.) Accordingly, as of November 1984, Japan was not bound under international law by either Footnote 1 to Table 3 or paragraph 10(e).

e. Japan is by far the most significant of the few remaining whaling nations. Not only do Japanese whalers account for the largest share of all whales harvested on a global basis, but Japan provides the export market for many of the whales harvested by nationals of other countries, including the Soviet Union. I believe that a cessation of all Japanese commercial whaling activities would contribute more to

the effectiveness of the IWC and its conservation program than any other single development.

f. Under Section 201 of the Magnuson Act, the Secretary of State may permit foreign vessels to fish in the United States' fishery conservation zone only to the extent that domestic fishermen are unable to harvest the optimum yield. The Administration's policy is to encourage the development of domestic fisheries and the export of fisheries products originating in the fishery conservation zone. To the extent this policy is effective, the total allowable level of foreign fishing referred to in section 201 of the Magnuson Act will decrease. Accordingly, the government's leverage under the Packwood-Magnuson Amendment can be expected to decrease as foreign fishermen are displaced by domestic fishermen. I therefore considered it desirable that certification under the Packwood-Magnuson Amendment, if required, occur soon.

4. Beginning on or about November 1, 1984, discussions were held between a Japanese delegation headed by Mr. Sano and a United States delegation headed by Dr. Byrne, the U.S. Commissioner to the IWC. The United States government's purpose in those negotiations was to induce Japan to withdraw its objections to Footnote 1 to Table 3 and to paragraph 10(e) of the Schedule in a manner supportive of the IWC's conservation program and the successful implementation of paragraph 10(e) in particular. The Japanese delegation, however, asserted that its instructions were limited to the question of sperm whaling from the Western Division of the North Pacific stock.

5. The result of these negotiations, which ended on or about November 13, 1984, is reflected in the exchange of letters referred to previously. In sum, the arrangement reflected in that exchange of letters permits me to (1) certify Japanese whaling inconsistent with any provision

of the Schedule to which Japan has not objected, (2) certify Japanese whaling inconsistent with the terms of the exchange of letters and (3) certify Japanese whaling in excess of any IWC quota which Japan has not agreed to comply with in the future, as evidenced by prospective withdrawal of its current objections.

6. On December 11, 1984, the Government of Japan withdrew its objection to Footnote 1, effective April 1, 1988, as contemplated by paragraph 1 of the Summary of Discussions. This action by the Japanese Government will render it bound by Footnote 1 after the 1987 coastal sperm whaling season ends in early 1988. This action alone, however, will not insulate Japan from certification under the Pelly and Packwood-Magnuson Amendments for coastal sperm whaling after the end of the 1985 coastal season. Japan would be insulated from such certification for any whaling after the effective date of paragraph 10(e) only if, on or before April 1, 1985, it withdraws its objection to paragraph 10(e) on the basis set forth in paragraph 2 of the Summary of Discussions.

7. In my view, the exchange of letters virtually assured one of two possible results: either Japan would terminate all commercial whaling no later than two seasons after paragraph 10(e) contemplates; or, Japan would fail to withdraw both of the relevant objections and be subject to certification in 1985, when sanctions under the Packwood-Magnuson Amendment would still have practical economic consequences to the Japanese fishing industry.

8. In determining whether Japanese commercial whaling in accordance with the exchange of letters would "diminish the effectiveness" of the Convention or its conservation program, I compared the situation as it existed in November 1984 with the situation as it would exist upon implementation of the exchange of letters by the Government of Japan. I concluded that the conservation program of the Convention and the long-standing policy

of the United States in support of a moratorium on all commercial whaling would be better served by the latter.

/s/ Malcolm Baldrige
Secretary of Commerce

Subscribed and sworn to before me this
14th day of January, 1985.

/s/
Notary Public, District of Columbia

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Nos. 85-954, 85-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

MALCOLM BALDRIGE, *et al.*,
Petitioners,

v.

AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

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REPLY BRIEF FOR PETITIONERS JAPAN WHALING ASSOCIATION, *ET AL.*

In this reply brief, the petitioners Japan Whaling Association and Japan Fisheries Association respond first to the respondents' counterstatement of the case. Under that first heading, the petitioners (1) correct the respondents' inaccurate

depiction of the state of the populations of the whale species subject to the Murazumi-Baldrige Agreement; (2) explain that, contrary to the respondents' description, the International Whaling Commission's decision to impose a moratorium on commercial whaling was primarily a political rather than a scientific decision; and (3) demonstrate the baselessness of the respondents' attack upon the good faith of the petitioners' government.

Then the Japanese petitioners address opposing legal arguments of the respondents, the House amici, and the federal petitioners. The opposing arguments leave unimpaired the petitioners' position that:

(1) the statutes under consideration call for the exercise by the Secretary of Commerce of judgment as to what conduct "diminishes the effectiveness" of the International Convention for the Regulation of Whaling;

(2) if construed so as to deny the Secretary of Commerce discretion to decide whether to certify a treaty partner and impose severe sanctions, the statutes effect an unconstitutional delegation of governmental power;

(3) the statutes should not in any event be read as applying to nations such as Japan that have lawfully exempted themselves from the restrictions imposed under such a convention; and

(4) a United States court cannot, and at the very least should not in the circumstances of this case, command Executive Branch officials to dishonor an international agreement upon which a friendly nation has relied and in such reliance has irretrievably changed its position.

I. THE RESPONDENTS MISREPRESENT THE FACTS CONCERNING WHALE POPULATIONS, THE WORKINGS OF THE IWC, AND THE ATTITUDE OF THE JAPANESE GOVERNMENT.

1. The respondents exaggerate to the point of distortion the state of the populations of the species of whales that are the subject of the Murazumi-Baldrige Agreement. (Resp. Br. 7-10.) The state of blue whale and right whale populations dealt with so dramatically by the respondents (*id.* 1-3) is quite irrelevant to any issue in this case. No stock of whales that is subject to this Agreement is in danger of depletion.

Under the Agreement, Japan took 400 sperm whales during each of the 1984-85 and 1985-86 coastal seasons (the latter of which has just ended) and is allowed to take no more than 200 during each of the two following seasons. That total of 1200 sperm whales -- 400 still at issue -- compares with a recital by Lyall Watson, an ardent advocate of a whaling moratorium, of "best estimates" of current total populations of 350,000 sperm whales in the southern hemisphere and 175,000 in the northern hemisphere. L. WATSON, WHALES OF THE WORLD 175 (rev. ed. 1985). Japanese petitioners cite Mr. Watson's statistics not because of a belief that they are the best estimate or most accurate calculation of whale populations, but because he is in fact a most zealous proponent of the moratorium. The official Department of Commerce estimate of the 1984-85 sperm whale population, prepared pursuant to the Marine Mammal Protection Act, was 982,000 whales worldwide,

198,000 in the North Pacific Western Division Stock. (Fed. Pet. Br. 43 n.50.)

Clearly Secretary of Commerce Baldrige acted prudently when, after consultation with his scientific experts, including Dr. John V. Byrne, the United States Commissioner to the IWC, he relied upon their judgment and that of the IWC Scientific Committee that a taking even at the rate of 400 whales a year for as long as five years "would have only a small effect on the stock [of sperm whales] in the short term." (Fed. Pet. Br. 4a-6a.) Despite the apocalyptic tone of the respondents' presentation, all that now remains in issue, so far as sperm whales are concerned, is the taking by members of the petitioner Japan Whaling Association of 200 of them in each of the next two years.

The Murazumi-Baldrige Agreement also allows for the taking by Japanese whalers in the 1986 and 1987 coastal seasons of Bryde's whales and minke whales and in the 1985-86 and 1986-87 pelagic seasons of antarctic minke whales within limits acceptable to the United States after consultation with Japan. The United States has found acceptable limits of a total of 1,941 antarctic minke whales for the 1985-86 pelagic season and 317 Bryde's whales and 320 coastal minke whales for the 1986 coastal season. These limits correspond to Japan's traditional share of quotas recommended by the IWC Scientific Committee and accepted as quotas by the IWC itself after the moratorium was adopted but before it went into effect.

In his book, Mr. Watson says that there are at least 200,000 minke whales in the world's oceans and that they "are multiplying rapidly," L. WATSON, *supra* p. 3, at 89; the

Department of Commerce estimates more than 300,000 (Fed. Pet. Br. 43 n.50). As for Bryde's whales, Mr. Watson states that "[t]here are clearly local concentrations in all tropical waters which could add up to a sizable world total," L. WATSON, *supra* p.3, at 94, a total that the Department of Commerce places at 30,200 (Fed. Pet. Br. 43-44 n.50).

The respondents seek to capitalize on the fact that the IWC Scientific Committee did not reach a consensus on potential long-term effects of limited whaling. (Resp. Br. 11 n.23.) The scientific uncertainty arises primarily from methodological differences. It is the kind of uncertainty that is commonly encountered in contemporary governmental decisionmaking. This Court has declared that, when a decision involves issues on the frontiers of science, a reviewing court should be most deferential to the determination made by the expert agency decisionmaker. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council,* 462 U.S. 87, 103 (1983). Given the substantial populations noted above and the very limited numbers allowed to the Japanese, there is no basis for faulting Secretary Baldrige's decision.

2. While the Secretary's decision was based upon a careful analysis of the best available scientific data, the IWC moratorium and the zero quota for sperm whales, by contrast, were adopted without compliance with three mandatory provisions of Article V-2 of the ICRW. That article requires, *inter alia,* (1) that any amendment to the IWC regulations be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources," (2) that the

amendment "be based on scientific findings," and (3) that it "take into consideration the interests of the consumers of whale products and the whaling industry." The IWC, whose meetings the federal petitioners tell us "have proven increasingly volatile and politicized as member countries have split into sharply polarized camps" (Fed. Pet. Br. 4), bypassed these requirements in adopting its increasingly stringent quotas and, ultimately, the moratorium.

"Save the Whales" has become an emotional rallying cry worldwide. The politicization of the IWC is a function in part of the consequent growth in its membership; small non-whaling countries such as Antigua/Barbuda, Belize, Mauritius, St. Lucia, St. Vincent, and the Seychelles have ratified the ICRW and became members of the IWC in the last few years. The new members have been vociferous advocates of greater restrictions on whaling. The Seychelles, which sponsored the moratorium resolution adopted by the IWC, has been represented in the IWC by Mr. Watson, who is a British subject; there are other similar examples.

The culminating act was the adoption of the moratorium on commercial whaling. Although the moratorium accords with United States policy, it should be understood that, despite the tenor of the respondents' brief, support of the moratorium is not indispensable to being a civilized person. In fact, there is substantial disagreement in the world community.

In our opening brief we quoted the comment of the observer from the United Nations Food and Agricultural Organization at the IWC meeting in 1982. The observer, Dr. J.A. Gulland, concluded: "Given the differing status of the

various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium." (Br. 6 n.3.) Dr. Gulland, currently with the Centre for Environmental Technology, Imperial College, London, is one of the world's leading whale population dynamicists. He was one of the original group of three scientists who, in 1965, compiled the IWC's first comprehensive whale population models. Other scientists, and not just in whaling nations such as Japan, share Dr. Gulland's view that the moratorium lacks scientific justification. *See, e.g.*, K. ALLEN, CONSERVATION AND MANAGEMENT OF WHALES (1980).

Japan, with its long cultural attachment to whaling, sees in the course of IWC actions, which the respondents describe with such enthusiasm, the triumph of non-scientific politicking and moralizing -- a triumph gained at the expense of its people.

3. Japan has nevertheless acceded to the reality of the moratorium. There is no ground for challenging, as respondents do (Resp. Br. 11-12), the good faith of Japan in agreeing to cease commercial whaling effective April 1, 1988. Japan has already honored the Murazumi-Baldrige Agreement by withdrawing its objection to footnote 1 of Table 3 of the IWC Schedule pertaining to sperm whales on December 11, 1984. Japan is also committed to withdraw its objection to the IWC moratorium effective April 1, 1988, if the United States obtains reversal of the court order to dishonor the Agreement. There is no dispute that withdrawal of these objections in the one case is and in the other case would be irrevocable.

The respondents speculate that Japan may circumvent its undertaking to discontinue commercial whaling by persuading the IWC to allow "coastal subsistence whaling" for sperm and Bryde's whales off the coast of Japan. (Resp. Br. 11-12.) This speculation misconceives the nature of subsistence whaling. The IWC places subsistence whaling in a separate category from commercial whaling. Quotas for subsistence whaling by indigenous peoples are established by the IWC based, *inter alia*, on a showing of nutritional need of the peoples involved and to avoid cultural disruption of their life style. The United States has not engaged in commercial whaling since 1972, but aboriginal subsistence whaling by Alaskan Eskimos has been authorized by the IWC; they take 26 bowhead whales per year. Denmark (Greenland) takes 10 fin whales and 110 West Greenland Stock minke whales, and the Soviet Union takes 179 grey whales under subsistence quotas. IWC Schedule ¶ 13(b)(1)(i).

Subsistence whaling is not a loophole or a means of circumventing a restriction or ban on commercial whaling but is a way of preserving the traditional lifestyle and diet of peoples historically dependent on whaling. The possibility that the IWC might in the future authorize small-scale whaling to accommodate Japanese coastal peoples is thus irrelevant to Japan's promised cessation of commercial whaling.

Similarly, the respondents assert that "Japan may well issue itself a permit for 'scientific' whaling" as a means of evading the Agreement. (Resp. Br. 12.) This aspersion on Japan, even to the point of the denigrating quotation marks, is totally unjustified. Article VIII of the ICRW recognizes catch

for purposes of scientific research as a sovereign right of a contracting government and therefore a legitimate activity under the Convention. Japan has long been at the forefront of whale research. It has spent more than 5.7 billion yen (over $20 million) on whale research during the past decade. The Government of Japan and Japan Whaling Association do not intend to conduct commercial whaling under the guise of legitimate scientific research.

The IWC, by unanimous decision of all its members, has directed that a comprehensive assessment of whale stocks be completed in order to reevaluate the moratorium no later than 1990. The Government of Japan and Japan Whaling Association intend to conduct scientific research as part of this comprehensive assessment, in order to prove that the moratorium is not scientifically justified and therefore was passed in contravention of the ICRW. The IWC recently convened a special meeting of its Scientific Committee to establish what research need be carried out under the comprehensive assessment mandated by the moratorium decision. Japan submitted a proposal of how to proceed with the comprehensive assessment, in full cooperation with the IWC's efforts.

Japan simply is not the defiant violator of international norms that the respondents attempt to picture. (Resp. Br. 10, 13.) Japan has acted in strict accord with the ICRW. Respondents may regard as an inconvenient technicality Article V-3 of the ICRW, under which a member has the right to lodge an objection to any IWC regulation and thereby exempt itself from it. But Article V-3 is a part of the Convention, as much as

the provisions enabling the IWC to regulate. Because of having filed objections pursuant to Article V-3, Japan has been free under the law of nations to take the whales it has taken since 1984. Furthermore, the taking accorded with Japan's agreement with the United States, entered into in good faith on both sides and scrupulously adhered to by Japan.

II. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS, READ IN THE LIGHT OF ALL RELEVANT AIDS TO CONSTRUCTION, CONFER UPON THE SECRETARY OF COMMERCE DISCRETION IN DETERMINING WHETHER CONDUCT OF FOREIGN NATIONALS DIMINISHES THE EFFECTIVENESS OF THE ICRW.

The court below said that the language of the Pelly and Packwood-Magnuson Amendments "does not indicate the boundaries of administrative discretion intended by Congress to apply." (Fed. Pet. App. 22a.) It sought and found its guide to the meaning of the critical statutory phrase -- "determines [whether conduct] diminish[es] the effectiveness" -- in the legislative history of the statutes.

The respondents disagree. They profess to find in the statutory phrase the clearest of directions to the Secretary of Commerce to certify for sanctions whenever, and in whatever circumstances, he finds that foreign nationals have exceeded an IWC quota. (Resp. Br. 16.) As both these Japanese petitioners and the federal petitioners have pointed out (Br. 22; Fed. Br. 18), Congress would have chosen different words

had its intention been to issue that sort of peremptory direction to the Secretary of Commerce.

The respondents in fact use a little sleight of hand in making their argument that the plain language of the statutes leaves no room for the exercise by the Secretary of Commerce of his judgment. They glide from the making of the determination whether foreign nationals are diminishing the effectiveness of an international fisheries convention -- which seems on the face of the statutory phrase to require the exercise of judgment -- to the unquestionably mandatory certification, once the determination is made, and to the imposition of the sanction, which is also unquestionably mandatory under Packwood-Magnuson. (Resp. Br. 16-17, 20.)

The respondents, to confirm the plain meaning of the statutes as they perceive it, rely on the same legislative history on which the court of appeals relied. (Resp. Br. 18-31.) Issue is fairly joined on the meaning of the legislative history. These petitioners and the federal petitioners contend that the history is consistent with the natural reading of the statutes as leaving to the informed judgment of the Secretary what conduct of foreign nationals is so inimical to the purposes of the ICRW as to call for certification and sanctions. We invite particular attention in this regard to the statements of the chairman of the cognizant House subcommittee and of President Carter when he signed the Packwood-Magnuson Amendment, quoted at pages 24-25 of our opening brief.

The House amici go out of their way to pick a quarrel where in truth there is none. They find in the petitioners' opening briefs a theory "proffered, if only indirectly," that, "in

parsing the legislative intent of a statute affecting foreign relations, the judiciary should depart from traditional standards of statutory construction and employ an analysis which rejects the use of legislative history as evidence of intent." (House Amici Br. 17, 4.) There is no want of analysis of the legislative history in the petitioners' briefs in this Court or any denial that the history is relevant to the ascertainment of legislative intent.

What the House amici apparently have in mind is Judge Oberdorfer's dissent below. Judge Oberdorfer indicated that, because the statutes in issue relate to foreign affairs, he would not so readily find a ministerial duty, enforceable by mandamus, on the basis of "secondary evidence of congressional intent" as he would if the statutes involved "domestic affairs." (Fed. Pet. App. 53a.) Though not espoused in these terms by either set of petitioners in this Court, Judge Oberdorfer's is a perfectly rational view. It accords with this Court's ruling that deference is owed to the administrative construction when a statute is ambiguous, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984), and with the principle that deference is particularly appropriate when the statute concerns foreign affairs, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322, 324 (1936).

Certainly the Japanese Government should not be expected to look behind the plainly judgmental terms in which Congress casts a statute to learn whether in fact the Cabinet officer with whom its diplomats are dealing has the authority to

make the promises that lead them to make serious and irretrievable concessions.

III. IF CONSTRUED TO IMPOSE ON THE SECRETARY OF COMMERCE A MINISTERIAL DUTY TO ENFORCE DECISIONS OF THE INTERNATIONAL WHALING COMMISSION, THE STATUTES INVALIDLY DELEGATE UNITED STATES GOVERNMENTAL POWER.

The interpretation of the Pelly and Packwood-Magnuson Amendments advanced by the respondents raises a serious question whether Congress has authority under the Constitution to fashion a system in which the Secretaries of Commerce and State become the automatic enforcement arm of the IWC. (Br. 28-32.)

The respondents cite *United States* v. *Sharpnack*, 355 U.S. 286 (1958), in support of their assertion that the delegation argument of the Japanese petitioners is "patently frivolous." In *Sharpnack* this Court upheld the constitutionality of the Assimilative Crimes Act of 1948, whereunder state criminal law is enforced in federal enclaves located within a state. The laws that *Sharpnack* allows to be enforced in the federal enclave are by definition duly enacted by a state legislature subject to the constraints imposed by both the state and federal constitutions.

There are effectively no such constraints on the IWC, which, as we have pointed out, failed to abide by governing provisions of the ICRW in adopting the zero quota and the moratorium. Under the respondents' interpretation of the Pelly

and Packwood-Magnuson Amendments, the Executive Branch would be compelled to enforce without question any regulation the IWC might adopt even though the regulation was made in derogation of provisions of the Convention and in violation of international law.

The respondents also assert that Congress in the Northern Pacific Halibut Act of 1982 incorporated into United States law the provisions of a halibut fisheries agreement between the United States and Canada. There is no analogy between the Halibut Act and the Pelly and Packwood-Magnuson Amendments as the respondents construe them. Section 4 of the Halibut Act, 16 U.S.C. § 773b, empowers the Secretary of State, in his discretion, to accept or reject recommendations made by the commission established under the halibut agreement. A rejected recommendation is not binding on United States nationals.

IV. THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS CANNOT PROPERLY BE READ AS APPLYING TO JAPAN, WHICH HAS LAWFULLY EXEMPTED ITSELF FROM ICRW RESTRICTIONS.

It is far from "nonsense" (Resp. Br. 19 n.24) to argue, as the Japanese petitioners do, that the Pelly and Packwood-Magnuson Amendments should not be construed to apply to a nation such as Japan that has lawfully exempted itself from IWC restrictions and therefore commits no international wrong by taking more whales than the IWC restrictions allow.

It is the long-standing rule, established by decisions of this Court, that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook* v. *United States*, 288 U.S. 102, 120 (1933)). Whatever else Congress did in the Pelly Amendment, it did not, when it used the phrase "diminish the effectiveness," clearly express a purpose to modify or abrogate any provision of the convention regulating Atlantic salmon, the whaling convention, or any other fisheries convention.

Nor is it correct to assert, as both the respondents and the federal petitioners do, that the application of sanctions to objecting nations is not so inconsistent with the ICRW as to result in an abrogation or modification. To be sure, as the respondents say, "[n]o provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas." (Resp. Br. 19 n.24.) No more does any provision of the Convention say that other parties are free to apply economic pressure to an objecting nation. The unmistakable implication of Article V-3 is that any such pressure would be inconsistent with the right of objection on which the United States insisted.

Under the respondents' interpretation of Pelly and Packwood-Magnuson (joined in this respect by the Solicitor General), the United States, which insists on the presence of an objection mechanism in all multilateral treaties to which it is a party, would at the same time be informing the world that it will use economic sanctions to prevent other signatories from

exercising the same right of objection that it demands. The very statement of that kind of position condemns it.

Moreover, the claim that a nation's exercise of a right conferred by a provision of a treaty diminishes the effectiveness of the very treaty of which it is a substantive part is self-contradictory and paralogistic. Any provision of a treaty must be deemed by the signatories to further the objectives of the treaty or, at the very least, to be necessary to achieve agreement on the adoption of the treaty in the first instance. It cannot diminish the effectiveness of the treaty to act pursuant to such a provision. This conclusion cannot be avoided by the use of euphemisms such as the federal petitioners employ when they argue that it is not unlawful to "attach adverse consequences" to the exercise of treaty rights, citing this Court's decision in *Moser* v. *United States*, 341 U.S. 41 (1950). The significant thing is that this Court ultimately refused in *Moser*, on the basis of equitable considerations, to enforce against Moser the "adverse consequences" of his exercise of a right under the treaty. *Id.* at 47.

V. THIS IS NOT AN APPROPRIATE CASE FOR JUDICIAL INTERVENTION.

For several reasons, this is not a case for judicial intervention by way of a mandatory order, whether termed injunction or mandamus, that compels a United States official to act in disregard of his own reasonable construction of a statute that he administers. The Court should not intervene in this case in view of its foreign policy implications, the lack of a

clear non-discretionary duty on the part of the Secretary of Commerce, and the equities that argue so strongly for not forcing the United States to breach its promise to Japan.

First, the case is not justiciable. It falls within at least two of the criteria specified in *Baker* v. *Carr*, 369 U.S. 186 (1962), for a nonjusticiable political question. One criterion is "an unusual need for unquestioning adherence to a political decision already made," and another is "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

Here, because Japan has acted upon a decision already made by one of the political branches to give its word not to impose sanctions if concessions were made, there is surely "an unusual need for unquestioning adherence" to that Executive Branch decision. By the same token, the "potentiality of embarrassment" would be realized if the decision below were allowed to stand.

The embarrassment is great. The United States, through the Executive Branch, has pronounced that the limited taking of whales by Japan for a short period would not diminish the effectiveness of the ICRW and therefore would not lead to the imposition by the United States of sanctions against Japan. The Judicial Branch, by its contrary pronouncement that Japan must be deemed to have diminished the effectiveness of the ICRW, would force the Executive Branch to renege on its commitment, even though it has led Japan to take irrevocable steps to terminate commercial whaling. Our argument in this respect is not, as the House amici would have it (House Amici Br. 18.), that all

"Congressional enactments affecting foreign affairs are nonjusticiable." It is that, on its particular facts, considering all the circumstances, this case is not justiciable. We ask for just that "discriminating analysis of the particular question posed" in terms of, *inter alia*, "the possible consequences of judicial action" that the Court spoke of in *Baker* v. *Carr*. *Id.* at 211-12.

As Judge Oberdorfer wrote, even if the case is justiciable, however, "the factors which call justiciability into question . . . heighten the need for forbearance by the courts in the absence of a clear command from Congress." (Fed. Pet. App. 51a). Those same considerations that the Court outlined in *Baker* v. *Carr*, especially "the potentiality of embarrassment" discussed above, call for special caution in the courts' exercise of their equity powers. When the proposed injunction or mandamus would have the kind of impact that the order below would have on the Executive's conduct of the foreign relations of the United States, such caution is not a "nebulous and nonspecific way" of avoiding jurisdiction, as the House amici put it (House Amici Br. 8), but represents a sound principle of equitable discretion.

In addition, there is another consideration suggested by Judge Oberdorfer's dissent. (*See* p. 12, *supra*.) The courts below found a ministerial duty, enforceable by mandamus, in statutory language that imposes no such duty on its face. It cannot fairly be said in these circumstances that the defendant Cabinet officers owe "a clear non-discretionary duty," a prerequisite to a mandatory order, *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984).

Finally, there are the strongest possible equitable considerations that militate against the exercise of any judicial power that there may be. We have detailed these in our opening brief. (Br. 45-49.) The respondents offer no rational response to them. Their argument is that "the ultimate equity is that Congress intended mandatory certification under Packwood-Magnuson and consequent loss of fishing privileges for violation." (Resp. Br. 39.) Even if that were an accurate description of what Congress has done, it would not constitute "the ultimate equity." The ultimate equity is that the United States has given its solemn word to Japan and Japan has acted in reliance on that promise made by the United States. Both governments acted in good faith, their actions premised on a United States Cabinet officer's reasonable understanding of his authority. In that situation, the respondents' simplistic and draconian arguments should be rejected.

CONCLUSION

For reasons stated in the opening briefs of these Japanese petitioners and the federal petitioners and in this reply brief, the judgment below should be reversed.

Respectfully submitted,

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JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

MALCOLM BALDRIGE, ET AL., PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-954

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

In our opening brief, we explained that the court of appeals erred in holding that the Secretary of Commerce has a nondiscretionary duty to certify that Japan's temporary and limited whaling in excess of international quotas—conditioned upon complete termination of its commercial whaling activities—has "diminished the effectiveness" of the International Convention for the Regulation of Whaling (ICRW). We demonstrated that the plain language of the Pelly Amendment, 22 U.S.C. 1978(a), and the Packwood Amendment, 16 U.S.C. 1821(e)(2), vests the Secretary with discretion in de-

termining whether a departure from International Whaling Commission (IWC) quotas "diminishes the effectiveness" of the ICRW (Fed. Br. 16-21). We also showed that the legislative history supports this interpretation (*id.* at 22-41) and that, even if the plain language and legislative history were open to debate, this Court should defer to the Secretary's reasonable interpretation of the statutes (*id.* at 41-46). Finally, we explained that relief in the form of mandamus was wholly inappropriate in this case (*id.* at 46-50).

Respondents have failed to refute our position; furthermore they have failed to address the fundamental weakness of their own. They defend the court of appeals' conclusion that "where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary" (Pet. App. 42a). Yet they do not identify a single statement in the statutes or their legislative history that expressly imposes this requirement. And they do not explain why, if Congress had intended mandatory certification, it then couched the certification standard in discretionary terms. Respondents cite authorities ranging from *Moby Dick* to *Marine Mammal News*, but they offer no persuasive support for their construction of the statutes.[1]

1. We note, at the outset, that respondents' "counterstatement of the case" (Resp. Br. 1-10) lacks a measure of objectivity. Their description of the relevant legisla-

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[1] Congressional amici have filed a brief raising the "political question doctrine" and whether, "[w]here a congressional enactment may have some impact on international relations, is it improper for a court to consider a statute's legislative history in determining Congressional intent" (Amicus Br. I). Amici expressly state, however, that they "do not address the proper reading of the statute" (*id.* at 3). Thus, they take no position on the central issue in this case. As our opening brief makes clear, the "political question" issues raised in Judge Oberdorfer's dissent need not be reached (Fed. Br. 47 n.56). Furthermore, there is no dispute that legislative history is relevant to statutory interpretation (see Fed. Br. 22-41). Thus, there is no need to discuss the questions that amici pose.

tion is inaccurate in several significant aspects.[2] And their description of Japan's whaling activities overlooks a number of salient facts.[3] But most troubling, respondents simply gloss over the extreme character of their position. Respondents demand automatic imposition of severe economic sanctions against a foreign ally—historically and culturally committed to whaling—that has agreed to join in the IWC moratorium. They ask this Court to nullify an international agreement with Japan that, in the informed judgment and expert opinion of the Secretary of Commerce (and the Secretary of State), advances the ultimate cause of whale conservation.[4]

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[2] For example, respondents state that the Pelly Amendment was enacted "in reaction to the devastation of the great whales" (Resp. Br. 4). However, the legislative history makes clear that the statute responded primarily to Denmark's over-exploitation of Atlantic salmon. See Fed. Br. 24-27. Respondents also state that Congress, in enacting the Pelly Amendment, "explicitly rejected the methods of bilateral diplomacy, with their traditional tradeoffs and compromises" (Resp. Br. 4). However, the legislative history indicates that Congress expected that negotiations would continue to play an important role. See Fed. Br. 27-28 nn.33 & 34. Indeed, the Danish salmon crisis, which precipitated the legislation, was resolved through negotiated settlement. See Fed. Br. 29-30 n.36. Respondents further state that "the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified" (Resp. Br. 5). Again, this is inaccurate. See note 15, *infra*.

[3] For example, respondents note that Japan cast "the only vote in opposition" to sperm whale harvests from the Western Division Stock (Resp. Br. 8) but neglect to mention that Japan was the only nation that harvested whales from that Stock (Fed. Br. 5). And they imply (Resp. Br. 10) that when "Japan continued to take sperm whales in the 1982-83 and 1983-84 seasons" it did so under formal objection; in fact, the IWC expressly permitted these takings (Fed. Br. 5-6). They also state that Japan is conducting whaling operations in "palpable violation" of IWC decisions (Resp. Br. 11), but neglect to mention that the ICRW expressly permits whaling nations to object to IWC quotas and thereby exempt themselves from the IWC taking prohibitions (Fed. Br. 4).

[4] Japan, by submitting to the IWC moratorium, must terminate all commercial whaling activities unless and until the IWC itself

At bottom, respondents seem to object to *any* taking of whales, irrespective of IWC judgment. For example, they criticize (Resp. Br. 11 n.23) the Secretary's reliance on the IWC Scientific Committee's conclusion that Japan's limited whaling "would have only a small effect on the stock in the short term" (Fed. Br. Addendum II) and that the long-term effects are open to scientific debate (*ibid.*). Furthermore, they castigate Japan for participating *within the ICRW framework* on the IWC's reevaluation of the moratorium and a redefinition of subsistence whaling (Resp. Br. 11-12). In sum, respondents seem to be philosophically opposed to any accommodation with whaling nations.

2. Respondents contend that the Executive's duty to obey the law, the plain language and legislative history of the statutes, and past agency practices support their position. None of these arguments is persuasive.

a. Respondents first contend that "the Executive Branch is not above the law just because its action affects foreign affairs" (Resp. Br. 13). But the government has never suggested that it can deviate from its constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. We do not "think Congress erred" (Resp. Br. 15); instead, we submit that the courts below gave a mistaken interpretation to the relevant statutes (Fed. Br. 15-41). We urge, in accordance with this Court's decisions, that the judiciary should respect reasonable Executive Branch interpreta-

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allows further whaling. Respondents are well aware that the non-whaling nations now dominate the IWC and, accordingly, the moratorium decision is unlikely to be reversed. Indeed, the adoption of the moratorium is largely attributable to the success of non-whaling nations in recruiting new signatories that have joined the non-whaling camp. See *Review of the 33d International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 13-14 (1981). Thus, respondents are simply "crying wolf" in contending (Resp. Br. 11) that Japan's commercial whaling industry will continue.

tions of statutes affecting foreign affairs (*id.* at 42-46) and that the courts below erred in exercising their mandamus powers in light of the foreign relations consequences of this dispute (*id.* at 48-50).[5]

b. Respondents next address the "plain language" of the Pelly and Packwood Amendments (Resp. Br. 16-17). They agree that these statutes instruct the Secretary of Commerce to certify foreign nations when he "determines that nationals of a foreign country * * * are conducting fishing operations in a manner or under circumstances which diminish the effectiveness" of the ICRW. 22 U.S.C. 1978(a); see 16 U.S.C. 1821(e)(2). But they assert that "knowing contravention of the IWC moratoria necessarily and by definition 'diminished the effectiveness' of the IWC and the Convention" (Resp. Br. 16). They make little effort to defend this statement, claiming that "[t]here is hardly much room for rational argument to the contrary" (*ibid.*). Their contention that this language creates a nondiscretionary duty to certify—enforceable by mandamus—is mistaken at a number of different levels.

First, respondents completely ignore that the Pelly and Packwood Amendments, by their plain terms, place the decision to certify within the informed judgment of the Secretary of Commerce. As we observed in our opening brief (Fed. Br. 19), statutory language "requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary." *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840). Thus, the plain language refutes respondents' contention that the statute im-

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[5] Respondents, by contrast, seem to think (Resp. Br. 14) that *this Court* has erred in stating that "[m]atters relating 'to the conduct of foreign relations * * * are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 19 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

poses a mandatory, nondiscretionary duty to certify, enforceable by mandamus.[6]

Indeed, the Pelly and Packwood Amendments *nowhere* state that the Secretary *must* certify every departure from IWC harvest quotas. Respondents' "plain language" argument rests wholly on their erroneous contention that all quota violations—regardless of magnitude and surrounding circumstances—"necessarily and by definition" (Resp. Br. 16) diminish the effectiveness of the ICRW. Respondents thus do not rely on "plain language" at all; they are simply drawing broad—and unjustified—inferences from the statutory terms.

As we note in our opening brief (Fed. Br. 4, 20 n.23), the ICRW does not require that a member country comply with IWC harvest quotas provided that the country files a timely objection. Thus, there is no merit to respondents' argument that any nation that files objections and take whales in excess of IWC quotas "necessarily and by definition" (Resp. Br. 16) diminishes the effectiveness of the ICRW. The Secretary *may* determine that whaling pursuant to a formal objection has that effect, but there is no requirement that he must reach that conclusion. Instead, the Secretary is charged with exercising informed judgment in light of the facts presented by each case. See Fed. Br. 20 n.23. In this instance, the Secretary reasonably concluded that Japan's limited short-term whaling, coupled with an agreement to withdraw its objection to the IWC sperm whale quotas and commercial whaling moratorium, did not warrant certification (see Fed. Br. 42-46).[7]

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[6] Cf. *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976) ("'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow hidden sense * * *'") (quoting *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

[7] Respondents' remaining contentions concerning the plain language are insubstantial. They state that the government is "hard put to suggest" that Japan's whaling "enhances the prestige or strengthens the authority or adds to the reputation and weight

c. Respondents submit that their position finds support in the legislative history of the Pelly and Packwood Amendments. We disagree. Respondents rely on doubtful inferences drawn from ambiguous statements in the floor debates and congressional hearings (Resp. Br. 18-21, 24-29). The deficiencies in respondents' arguments are fully discussed in our opening brief (Fed. Br. 24-29, 33-39). As we stated (*id.* at 28, 35), the legislative history nowhere contains an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Respondents' attempt to dispute that statement validates our conclusion.

Respondents find their "express authoritative statement" (Resp. Br. 25) in the 1979 House hearings addressing whaling oversight.[8] They claim that "Congress

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of either the IWC or the Convention" (Resp. Br. 16). Those, of course, are not the statutory criteria. Respondents state (*ibid.*) that the Secretary should not be permitted to "weigh any consideration whatever" in making a certification decision. That argument mischaracterizes both the government's position and the facts of this case. As we submit in our opening brief, the "diminish the effectiveness" standard "invests the Secretary with broad discretion to apply his expertise and evaluate all pertinent factors in each particular case" (Fed. Br. 19). The Secretary plainly considered wholly proper factors in reaching his decision in this case (see Fed. Br. Addendum III 5a-7a). Respondents further contend (Resp. Br. 17) that the failure to certify Japan displaces the Packwood Amendment's "remedial period" provisions. However, those provisions come into play only *after* the Secretary has determined that foreign nationals are diminishing the effectiveness of the ICRW. See note 11, *infra*. Congress can quite reasonably conclude that the Secretary shall have broad discretion in determining whether whaling activities diminish the effectiveness of the ICRW, while further concluding that once he certifies pursuant to the applicable standard, the foreign nation shall have a grace period prior to the imposition of permanent mandatory sanctions.

[8] *Fish and Wildlife Miscellaneous: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. Pt. 1 (1979) [hereinafter cited as the *June 4, 1979 House Hearings*].

sought and obtained from the Department of Commerce witness agreement that certification is mandatory and nondiscretionary with respect to intentional contravention of IWC quotas" (*ibid.*). Their interpretation of the colloquy is mistaken. Moreover, even if it were accurate, respondents fail to explain how a witness's conjecture can control the meaning of a previously enacted statute.

Respondents place their reliance on a statement from Richard Frank, Administrator of the National Oceanic and Atmospheric Administration, expressing agreement with Rep. Breaux's suggestion that "if a country is *violating the terms of an international treaty*, the Secretary * * * has to certify that he is doing that, and that is not a discretionary thing."[9] Obviously, Mr. Frank simply agreed that *treaty violations*—not departures from IWC harvest quotas—would result in certification. As we have previously discussed (page 6, *supra*; see Fed. Br. 4, 20 n.23), the relevant treaty—the ICRW—does not require compliance with IWC harvest quotas, provided that timely objections are filed.[10]

The Frank-Breaux colloquy plainly falls far short of an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas. Moreover, Mr. Frank's interpretation of the Pelly Amendment, offered in response to impromptu questions during a congressional hearing, can-

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[9] Resp. Br. 26 (emphasis partially deleted (quoting *June 4, 1979 House Hearings* 323)).

[10] Respondents also cite Mr. Frank's statement that "'[i]f a country were violating something in the schedule, for example, taking more whales than the schedule provides, *and that were a significant violation*, I believe it is clear that the Pelly amendment would apply'" (Resp. Br. 27 (emphasis partially deleted (quoting *June 4, 1979 House Hearings* 312)). However, this statement supports the government's position. Mr. Frank's express reference to *significant violations* demonstrated his understanding that the "diminish the effectiveness" determination necessarily required the exercise of discretion, a view that Rep. Breaux shared. See Fed. Br. 37 n.46.

not control the meaning of that statute, which was enacted eight years earlier, or the Packwood Amendment, which simply adopted the Pelly Amendment's certification standard (see Fed. Br. 34-35). Plainly, respondents cannot credibly suggest that this testimony—their most powerful support, culled from hundreds of pages of legislative history—establishes that the Secretary has a mandatory duty to certify departures from IWC harvest quotas. Cf. *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 14; *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972).[11]

Respondents challenge (Resp. Br. 31) the relevance of other international conservation statutes, cited by the government, that impart Executive Branch discretion through the use of the "diminish the effectiveness" stand-

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[11] See Recent Development, *International Conservation—United States Enforcement of World Whaling*, 26 Va. J. Int'l L. 513, 534 (1986) ("the complete legislative history of the phrase 'diminish the effectiveness' demonstrates congressional intent to provide the Secretary of Commerce with discretion in certifying a nation which exceeds international conservation programs"). Respondents continue to support their contention that certification of quota violations is mandatory by citing (Resp. Br. 20-21) legislative materials describing the post-certification steps in the sanctioning process. As we carefully explained in our opening brief (Fed. Br. 16-17), the certification and sanctioning process consists of three separate steps: (1) a determination—requiring the exercise of discretion—that foreign nations are conducting whaling operations in a manner that "diminishes the effectiveness" of the ICRW; (2) a certification, which is mandatory if an affirmative determination is made; and (3) the imposition of sanctions, which is discretionary under the Pelly Amendment and mandatory under the Packwood Amendment. It requires no "linguistic miracle" (Resp. Br. 21)—only attentiveness to language and syntax—to recognize that the mandatory language of the statutes applies to the second and third steps of the process. Respondents' argument (Resp. Br. 29-31) that the Packwood Amendment removed all discretion from the certification process founders on the same point. The Packwood Amendment left the "diminish the effectiveness" determination untouched (see Fed. Br. 34-35); it only curtailed sanctioning discretion (see *id.* at 37 n.46).

ard. These statutes are obviously relevant insofar as they demonstrate that the "diminish the effectiveness" standard has an established and generally understood meaning. Plainly, it would be anomalous if that standard imposed mandatory, non-discretionary duties on the Secretary in the case of whale conservation programs, but conferred discretion in the case of tuna and endangered species programs. Cf. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983).

Respondents also contend (Resp. Br. 31) that two of these statutes can be read to support their position. Their reliance on the Eastern Pacific Tuna Licensing Act of 1984 (EPTLA), 16 U.S.C. (Supp. II) 972 *et seq.*, is misplaced. As we explain in our opening brief (Fed. Br. 39-40), the EPTLA implements the Eastern Pacific Ocean Tuna Fishing Agreement (EPOTFA), which requires international licensing of tuna boats and provides for "conservation measures under specified circumstances." S. Exec. Rep. 98-13, 98th Cong., 1st Sess. 1 (1983). The EPTLA prohibits the Secretary of State from compensating tuna fishermen whose boats are seized by foreign governments pursuant to the EPOTFA unless the tuna boat's infractions are "not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. (Supp. II) 972c. The House report specifically observes that the application of this standard to conservation regulations requires the exercise of discretion.[12]

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[12] The House report states "the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the EPOTFA, *the seriousness of a violation of a conservation regulation would need to be determined by the Secretary*." H.R. Rep. 98-721, 98th Cong., 2d Sess. 5 (1984) (emphasis added). Respondents contend (Resp. Br. 33) that the House Committee viewed licensing violations as more serious than quota departures because licensing was the "primary purpose" of the EPOTFA; they then suggest that IWC quotas are the primary purpose of the ICRW. This inference is

Respondents also contend—mistakenly—that the 1962 Amendments to the Tuna Conventions Act, 16 U.S.C. 951 *et seq.*, support their position. They argue that this legislation, which also employs a "diminish the effectiveness" standard, requires nondiscretionary imposition of sanctions in response to violation of conservation regulations. Respondents draw this inference (Resp. Br. 34-35) from the Executive Branch's general statement of objectives (S. Rep. 1737, 87th Cong., 2d Sess. 7 (1962)). They completely ignore the Executive's accompanying explanation of its plans for implementation (*id.* at 7-8) and the subsequently enacted regulations (50 C.F.R. 281.5), which plainly contemplate the exercise of discretion. See Fed. Br. 22-24.[13]

Respondents make no claim that the 1978 Amendment to the Pelly Amendment supports their position; they

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doubtful. The Committee presumably gave special note to licensing infractions because they directly violate the EPOTFA itself (Fed. Br. 40 n.47). Furthermore, harvest quotas are not the "primary purpose" of the ICRW. The ICRW, in regulating whaling practices, does not specifically require harvest quotas (see Fed. Br. 4). Instead, conservation regulations, under *both* the EPOTFA and the ICRW, are promulgated through subsequent agreement by implementing commissions (Fed. Br. 40 n.47). In all events, the House report demonstrates that congressional committees know how to offer specific direction to the Executive Branch's exercise of discretion. As previously explained, the legislative history of the Pelly and Packwood Amendments contains no similar statements guiding the Secretary's exercise of discretion.

[13] Respondents claim (Resp. Br. 35) that "[i]mplementation of the 1962 Amendments * * * confirms the mandatory nature" of these provisions. The example they cite—the 1975 embargo of Spain's yellowfin tuna exports—confirms the opposite conclusion. The Notice of Embargo specifically states that the embargo was based on consideration of the factors set forth in 50 C.F.R. Pt. 281. See 40 Fed. Reg. 48159 (1975). It further states that Spain's fishing activities "are contrary to the conservation recommendations of the [Commission] *and* tend to diminish the effectiveness of the IATTC conservation recommendations * * *." *Id.* at 48160 (emphasis added). Thus, the embargo was not imposed solely on the basis of departures from the recommendations.

apparently concede that application of the "diminish the effectiveness" standard in that legislation requires the exercise of discretion.[14] Instead, respondents contend (Resp. Br. 36) that this legislation "is not an analogue" to the legislation at issue in this case. Plainly, they are wrong. The 1978 Amendment provides sanctions where foreign nationals "are engaging in trade or taking which diminishes the effectiveness of any international program for endangered species." 22 U.S.C. 1978(a)(2). It is based upon, codified within, and mirrors precisely the pre-existing Pelly Amendment certification provisions at issue in this case. See Fed. Br. 30-31. Respondents mistakenly argue (Resp. Br. 36) that the 1978 Amendment "sheds no light" on the certification standard, asserting that the legislation "was intended to support the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) [*opened for signature*, Mar. 3, 1973, 27 U.S.T. 1087]," which deals with endangered species trade. However, the legislation, by its express terms, has general applicability to both trade *and* taking; it applies to "any international program for endangered species." 22 U.S.C. 1978(a)(2). Cf. *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 10. Indeed, the House report states (H.R. Rep. 95-1029, 95th Cong., 2d Sess. 8-11 (1978) (emphasis added)):

> The nature of *any trade or taking* which qualifies as diminishing the effectiveness of *any international program for endangered or threatened species* will depend on the circumstances of each case.

See also Fed. Br. 31-32. Thus, the 1978 Amendment, in form and function, is directly analogous to the original Pelly Amendment.

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[14] Indeed, that conclusion is inescapable. The House Committee specifically directed the Secretary to exercise discretion in determining whether given actions "diminish the effectiveness" of the affected conservation programs. See Fed. Br. 30-33.

d. Respondents further contend (Resp. Br. 37-39) that the Secretary has consistently treated departures from harvest quotas as mandatory grounds for certification. They neglect to mention that the court of appeals rejected that contention, stating that "the record does not conclusively show what that practice has been" and that the matter "does not present a genuine issue of material fact" (Pet. App. 32a n.19).

Respondents are mistaken in asserting (Resp. Br. 5) that "as far as the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified." [15] The record shows that, while the United States has maintained that departures from harvesting quotas will generally result in certification, certification decisions are approached on a case-by-case basis.[16] In all events, a consistent record

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[15] Administration testimony in 1976 House Hearings revealed that, in 1974, American observers discovered 6 minor violations of IWC taking prohibitions involving the harvesting of undersized and nursing female whales. The Administration witness described these as "technical violations as opposed to a blatant, wilful taking of whales in an illegal way." *Marine Mammal Amendments: Hearings on H.J. Res. 923, H.R. 12460, H.R. 12646, et al. Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 21 (1976). In addition, the record in this case discloses numerous instances in which the Secretary declined to certify departures from IWC imposed requirements (J.A. 114-120 (Affidavit of Dean Swanson, Special Assistant to United States IWC Commissioner)). For example, the United States agreed in 1983 to withhold certification of Chile's limited whaling in excess of IWC quotas in exchange for Chile's agreement to comply with the IWC whaling moratorium (*id.* at 118).

[16] Indeed, the materials that respondents cite demonstrate this fact. For example, respondents quote President Ford's statement that departures from IWC harvest quotas present a "'prima facie'"—rather than a *conclusive*—case for application of the Pelly Amendment. Resp. Br. 5 (quoting White House Press Release, Jan. 16, 1975 (J.A. 175)). And respondents quote the Secretary's statement certifying Chile, Peru and Korea "based on the fact that those countries are not members of the IWC and their

of certification would not demonstrate that certification is mandatory; that record would equally demonstrate that the Secretary determined that the particular circumstances in each of those instances warranted certification. Thus, respondents' reliance on the government's past certification record adds nothing to their position that certification is *always* required.[17]

e. Respondents offer this Court no guidance in the event that it finds the Pelly and Packwood Amendments ambiguous. As we explained in our opening brief (Fed. Br. 41-42), if this Court finds congressional intent uncertain, the Secretary's reasonable construction should control. Respondents do not (and, indeed, cannot) dispute that the Secretary's construction of the Pelly and

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nationals harvest whales *substantially* in excess of IWC quotas * * *." Resp. Br. 23 (quoting Letter from the Secretary of Commerce to the President, Dec. 14, 1978 (J.A. 177) (emphasis added)). Plainly, there would be no need to consider the circumstances and seriousness of the quota departure if—as respondents insist—certification of all quota departures is mandatory. Respondents rely heavily (Resp. Br. 38-39) on Secretary Baldrige's 1984 letter to Senator Packwood concerning application of the Pelly and Packwood Amendments (J.A. 198). That letter simply recognizes a general policy toward nations that "choose[] to ignore" (*ibid.*) the IWC whaling moratorium. It does not (and could not) estop the Secretary from declining to certify a nation that agrees to comply—after a short delay—with the IWC decision and thereby guarantee achievement of the IWC's objectives.

[17] Respondents also attempt to find support in *Adams* v. *Vance*, 570 F.2d 950 (D.C. Cir. 1978), a suit brought by Alaskan Natives to compel the United States to file an objection to IWC limitations on aboriginal whaling. Respondents note that the government officials, in resisting that suit, stated that "a United States objection could result in the breakdown of [the] IWC" (Resp. Br. 37-38 (quoting Aron Affidavit (J.A. 153-154)). The situation in *Adams* is plainly distinguishable—the United States has not filed an objection to IWC quotas in the present case; it is exercising discretion in not imposing its *own* economic sanctions. Furthermore, *Adams* supports our position that the United States must exercise informed judgment and balance competing interests when formulating international conservation policies.

Packwood Amendments would qualify as a reasonable interpretation of ambiguous statutory language (*id.* at 42-46). The Secretary quite sensibly interprets those statutes to permit consideration of all relevant factors in making a certification decision.[18]

3. Respondents argue that the court of appeals correctly affirmed the district court's mandamus order requiring the Secretary to certify Japan. As we noted in our opening brief (Fed. Br. 46), mandamus relief under 28 U.S.C. 1361 is plainly inappropriate because the Secretary does not owe respondents "a clear nondiscretionary duty" (*Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)) and because institutional and equitable considerations weigh against the exercise of an extraordinary remedy.[19]

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[18] We note that the Secretary's interpretation is consistent with recent scholarly literature concerning effective imposition of international economic sanctions. See G. Hufbauer & J. Schott, *Economic Sanctions Reconsidered: History and Current Policy* (1985). These commentators examine 103 cases of attempted imposition of international economic sanctions and conclude that "sanctions occasionally bear fruit, but only when planted in the right soil and nurtured in the proper way" (*id.* at 81). They note that a government "should think through its means and objectives *before* taking a final decision to deploy sanctions" (*id.* at 91 (emphasis in original)).

[19] Respondents seemingly agree that, if the court of appeals erred in concluding that "certification is mandatory and nondiscretionary" (Pet. App. 42a) they are entitled to no relief. They contend, however (Resp. Br. 42 n.35), that "[e]ven apart from the mandamus statute itself, a mandatory injunction to compel [a] nondiscretionary duty is authorized" under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* The courts below implicitly rejected that theory, basing relief on 28 U.S.C. 1361 and stating that "no other adequate remedy exists" (Pet. App. 42a; see *id.* at 83a). See, *e.g.*, *Nova Stylings, Inc.* v. *Ladd*, 695 F.2d 1179 (9th Cir. 1983) (mandamus unavailable where APA provides relief). Cf. *Heckler* v. *Ringer*, 466 U.S. at 616 (mandamus available only where the plaintiff "has exhausted all other avenues of relief"). The APA does not, of course, confer jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99 (1977). And plaintiffs seeking APA relief in the nature of mandamus must still demonstrate that they are owed a duty, viola-

a. Respondents contend—quite remarkably—that they are entitled to mandamus relief even though the government owes them no specific duty to certify Japan. They assert (Resp. Br. 41 (footnote omitted)):

> Mandamus has long been available to "any person" who sustains injury when an Executive Officer refuses to perform a nondiscretionary duty. *Garfield* v. *Goldsby*, 211 U.S. 249, 261 (1908) (quoting *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1875)). And no case holds that the type of injury required to invoke mandamus differs from the type of injury required to provide standing to sue in the first place.

In short, respondents argue that 28 U.S.C. 1361 authorizes anyone who can meet minimal standing requirements to bring a mandamus action against the government. Plainly, this is not the law.

Respondents completely ignore the plain language of the mandamus statute, which confers mandamus jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a *duty owed to the plaintiff*." 28 U.S.C. 1361 (emphasis added). This language could hardly be more explicit: Section 1361 does

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tion of which would constitute a "legal wrong." 5 U.S.C. 702. Furthermore, APA relief is circumscribed by provisions preserving equitable limitations on remedies (*ibid.*), and withholding "authority to grant relief if any other statute that grants consent to suit [such as 28 U.S.C. 1361] expressly or impliedly forbids the relief which is sought" (5 U.S.C. 702(2)). Thus, the APA, even if applicable, would not relax the standards for the relief respondents seek. See 5 U.S.C. 703.

Notably, respondents do not contend that the Secretary's decision against certification constitutes an "abuse of discretion" within the meaning of the APA. See 5 U.S.C. 706(2)(A). Indeed, there is serious doubt whether the Secretary's exercise of discretion would be subject to APA review. See 5 U.S.C. 701(A)(2). See, *e.g.*, *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); *Johnson Oyster Co.* v. *Baldridge* [*sic*], 704 F.2d 1060 (9th Cir. 1983). In all events, the record in this case demonstrates that the Secretary properly exercised his discretion.

not provide a remedy for one who merely claims injury, sufficient to confer standing, from government inaction.[20]

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[20] Respondents confuse the concepts of jurisdiction, a cause of action, and standing. See *Davis* v. *Passman*, 442 U.S. 228, 239-240 n.18 (1979). Section 1361 confers jurisdiction over cases in which the government, as a matter of law, owes a nondiscretionary duty to the plaintiff. Respondents, therefore, must first establish their cause of action by identifying the federal right—and consequent government duty—that entitles them to mandamus relief. See *ibid.* An allegation that the government has failed to adhere to statutory requirements, even if coupled with a claim of injury, is insufficient to establish a mandamus cause of action. Instead, respondents must identify a "duty owed" specifically to them. 28 U.S.C. 1361. See generally *Davis*, 442 U.S. at 240 n.18. Furthermore, a cause of action is distinct from the concept of standing, which turns on whether respondents themselves can assert sufficiently discrete injury and prospects for redress to create a case or controversy. See *ibid.*

Respondents have raised the question of their standing (Resp. Br. 41, 42 n.35); we therefore offer a brief response. The issue of standing need not be reached; since respondents are not entitled to relief under the mandamus statute, "questions of standing * * * become immaterial." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974). See *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984); *Norton* v. *Mathews*, 427 U.S. 524, 532 (1976). Should this Court disagree, we do acknowledge that respondents' standing is open to question in light of this Court's recent decisions. See, *e.g.*, *Allen* v. *Wright*, No. 81-757 (July 3, 1984). Even if it is assumed that respondents have a sufficiently discrete interest in "long-term effects" (Resp. Br. 11 n.23) on free-roaming whales inhabiting international waters to allege "personal injury fairly traceable to" (*Allen*, slip op. 12-13) the Secretary's decision against certification of Japan, they cannot realistically contend that their alleged injury is "likely to be redressed by the requested relief" (*ibid.*). Respondents' contention that certification of Japan will lead to a halt in Japanese whaling is "pure speculation" (*id.* at 20). See Fed. Br. 42-45, 49. The Soviet Union has been certified (*id.* at 7 n.13) but continues to conduct whaling activities. And a recent empirical study concludes that "[i]n most cases, sanctions do not contribute very much to the achievement of foreign policy goals." G. Hufbauer & J. Schott, *supra* note 18, at 79. See also Recent Development, *supra* note 11, 26 Va. J. Int'l L. at 542-544. Thus, respondents'

Section 1361's legislative history confirms that a plaintiff seeking mandamus cannot premise his claim on mere injury sufficient to confer standing. The original bill authorized a remedy to compel a government agent "to perform his duty." See H.R. 1960, 87th Cong., 1st Sess. (1961); see 107 Cong. Rec. 12157 (1961). However, the Senate Committee amended this language, at the recommendation of the Justice Department, to make clear that "the bill is limited to compelling a Government official or agency to perform a duty owed to the plaintiff * * *." S. Rep. 1992, 87th Cong., 2d Sess. 1-2 (1962).[21] The Senate report specifically states that the bill "does not create new liabilities or new causes of action against the U.S. Government" (*id.* at 2).

Finally, the case law refutes respondents' argument that mandamus is available upon a showing of injury sufficient to confer standing. The courts, in accordance with Section 1361's express terms, consider the availability of mandamus in light of whether a *duty* is owed to the plaintiff.[22]

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standing appears dubious. Compare, *e.g.*, *Allen*, slip op. 20-21; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).

[21] The House concurred in this amendment. See 108 Cong. Rec. 20093 (1962) (Rep. Forrester) ("The Senate amended the House bill to spell out in greater detail the nature of the jurisdiction conferred. The Senate amendment makes it clear that the duty must be one owed to the plaintiff.").

[22] See, *e.g.*, *Heckler* v. *Ringer*, 466 U.S. at 616 (mandamus available "only if the defendant owes [the plaintiff] a clear nondiscretionary duty"). See generally 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* § 46.01 (1985). Contrary to respondents' suggestion (Resp. Br. 41), the courts do not afford mandamus relief to plaintiffs who, while perhaps able to demonstrate injury from government inaction, cannot show that the government owes them a specific duty. See, *e.g.*, *Tagupa* v. *East-West Center, Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (compliance with civil rights regulations); *Rush* v. *Parham*, 625 F.2d 1150, 1154 n.5 (5th Cir. 1980) (disapproval of state Medicaid plan); *Kirkland Masonry, Inc.* v.

b. Respondents contend (Resp. Br. 39-43) that this Court should give no allowance to institutional and equitable principles when considering mandamus relief. Plainly, this Court can and should take such factors into account. See Fed. Br. 47-48; see also, *e.g.*, *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 360-361 (1933). Furthermore, the factors that we have cited—in particular, the foreign relations implications of ordering certification—are plainly appropriate considerations in determining whether to order equitable relief. See *Allen* v. *Wright*, slip op. 22-23.

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

Commissioner, 614 F.2d 532, 534 (5th Cir. 1980) (disclosure of past tax audit information); *Davis Associates, Inc.* v. *Secretary of Housing & Urban Development*, 498 F.2d 385, 388 (1st Cir. 1974) (acceptance of construction bid). Indeed, even prior to the enactment of 28 U.S.C. 1361, the courts required a plaintiff to show he possessed a specific right that created a reciprocal government duty. See, *e.g.*, *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543 (1937) ("Where the right of the petitioner is not clear, and the duty of the officer * * * is not plainly defined and peremptory, mandamus is not an appropriate remedy."). The cases respondents cite (Resp. Br. 41) as contrary authority—*Garfield* and *McComb*—both involved plaintiffs who held specific rights that created reciprocal government duties. See *Garfield*, 211 U.S. at 262-263 (right to notice and hearing prior to extinguishing previously awarded property interests); *McComb*, 92 U.S. at 540 (contractual rights limiting state use of consolidation bonds). Although both cases refer to the plaintiff's "personal injury" (211 U.S. at 261; 92 U.S. 541), they use the term in the accepted sense of that era—as "a wrong which directly results in the violation of a legal right." *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479 (1938).

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Nos. 85-954, 85-955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MALCOLM BALDRIGE, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

JAPAN WHALING ASSOCIATION, *et al.*,
Petitioners,
v.
AMERICAN CETACEAN SOCIETY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Secretary of Commerce had the statutory discretion to determine that Japan's refusal to abide by the International Whaling Commission's whaling moratoria did not diminish the effectiveness of the Whaling Convention.

2. Whether, if he had no discretion, the courts should nevertheless refuse to grant appropriate judicial relief from his statutory violation.

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H.R. Rep. No. 721, 98th Cong., 2d Sess. (1984) 33
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BRIEF FOR THE RESPONDENTS

COUNTER-STATEMENT OF THE CASE

I. THE MODERN DECIMATION OF THE WORLD'S GREAT WHALES

A century and a quarter ago, Herman Melville wondered whether, "Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters."[1] History has borne out Melville's fears. In 1970 the Secretary of

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[1] H. Melville, *Moby Dick* 491 (Macmillan Co., N.Y. 1962) (1st ed. 1851).

the Interior listed eight species of great whales—including the sperm whale of Melville's *Moby Dick*—under the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969). 35 Fed. Reg. 18,319, 18,320 (1970).[2]

The destruction of the great whales is an event of our age. The masthead lookouts of Melville's day have been replaced by sonar and helicopters, the oared longboats with high-powered catcher ships.[3] The reproductive abilities of the whales, however, remain fixed to a slower biological clock. A female sperm whale evidently can bear one calf every three years; the calf, if it survives, may not reach breeding status itself for ten to thirty years.[4]

The slow reproductive and growth rates of the whales, and the increased killing capabilities of Twentieth Century whaling ships, combined in a predictably tragic fashion. The blue whale, the largest animal known to evolutionary history, merely thirty years ago was thought capable of sustaining an annual catch of about 1,200 animals. Today, scientists believe there are so few of these creatures that males and females may not be able to find each other across the vastness of the oceans.[5] The right whale, so named because its slow swimming

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[2] The term "great whales" is often used to describe the ten largest species of the order Cetacea that have been, or are now, commercially hunted. Most species are classified as "baleen" whales because of the large plates of baleen (or "whalebone") through which the animals filter their diet of small, shrimp-like crustaceans and other small marine organisms; only one of the great whales, the sperm whale, is a toothed whale. *See* S. McVay, *The Last of the Great Whales*, 215 *Scientific American* 13, 14-15 (1966).

[3] *See generally*, J. Tonnessen, A. Johnsen, *The History of Modern Whaling* 609-37 (1982); Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, (Part One) 6 Ecology L.Q. 323, 359 & nn.175 & 176 (1977).

[4] Scarff, *supra*, n.3, at 335 & 337.

[5] G. Small, *The Blue Whale*, 70-71 (1970).

once made it the "right" whale to kill, has had to be protected by a complete moratorium since 1940. Most of its scattered groups have not appreciably increased for the past forty years.[6]

II. THE INTERNATIONAL EFFORT TO REGULATE WHALING

The International Convention for the Regulation of Whaling ("ICRW" or "Convention"), which created the International Whaling Commission ("IWC"), was signed in 1946 and entered into force on November 10, 1948. In its early years, the IWC served as little more than a cartel to stabilize whale oil prices (J.A. 150).[7] This was accomplished in the 1950's and 1960's through the establishment of overall yearly quotas, expressed in terms of "blue whale units," which allowed member nations to kill freely whichever species they chose. *See* 62 Stat. 1716, 1724 (1946). The result was biological disaster. Yet, despite repeated warnings from scientists during these decades that whale populations had reached dangerously low levels,[8] the IWC was paralyzed. When conservation amendments were adopted, the amendments had no sanctions. Resistant members could file objections,[9]

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[6] *Id.* at 3-4; NOAA, 46 Marine Fisheries Review, No. 4 at 43 (1984).

[7] "J.A." and "A.A." refer to the Joint Appendix and the Appellees' Appendix filed in the Court of Appeals, copies of which have been lodged with the Clerk of this Court. "Pet. App." refers to the appendix to the petition for certiorari in No. 85-955. "Fed. Br." refers to the brief filed in No. 85-955 by the Federal Petitioners. "J.W.A. Br." refers to the brief filed in No. 85-954 by the Japan Whaling Association, Petitioners.

[8] *See, e.g.*, N. Mackintosh, *The Stocks of Whales* 180 (1965); Scarff, *supra* n.3, at 358-66.

[9] In 1964, the IWC voted to protect the blue whale in the Antarctic. Japan objected. Other nations followed its lead. Scarff, *supra* n.3, at 364. The protection effort collapsed.

or even withdraw temporarily from the Convention, with impunity.[10]

It was not until the early 1970's that the IWC began to shift toward quotas for individual species and abolished the blue-whale-unit system. *Circular Communications to All Contracting Governments*, Oct. 5, 1972, 23 U.S.T. 2820. By that time several species of the world's largest whales, including the blue and humpback whales, had been driven to "commercial extinction"—their numbers so decimated by unrestrained slaughter that it was no longer economical to hunt for them (J.A. 148, 127).

III. THE DETERMINATION OF THE U.S. CONGRESS TO SUPPORT IWC QUOTAS—THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS

The Congress of the United States was in the forefront of the drive for effective whale conservation through the instrumentality of the Convention. At the outset, it authorized and established the principles governing United States participation in the Convention, and provided for the appointment of the Commissioner. Whaling Convention Act, 48 Stat. 2090, 16 U.S.C. § 916 *et seq.* (Aug. 9, 1950). In 1971, both the House and the Senate passed resolutions calling for an international whaling moratorium. S.J. Res. 115, 92nd Cong. 1st Sess. (1971); H.Con. Res. 387, 92d Cong., 1st Sess. (1971). *See* 117 Cong. Rec. 38,537-40 (1971). And in reaction to the devastation of the great whales—and to the collapse of the Atlantic salmon—Congress also adopted the 1971 Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978. Congress' intent was plain from the beginning. It was determined to put teeth into the international control of whaling through the Convention process; it explicitly rejected the methods of bilateral diplomacy, with their traditional tradeoffs and compromises.

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[10] Japan withdrew temporarily from the Convention in 1959 over quota disagreements. Scarff, *supra* n.3, at 361 & n.196.

Under Pelly, so far as the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified. In each instance, quota violations were determined by the Executive Branch to "diminish the effectiveness" of the International Whaling Convention.

In 1974, the Secretary of Commerce made the first certifications under the Pelly Amendment (J.A. 168-72). Both Japan and the Soviet Union had objected, as permitted by the Convention, to an IWC total quota of 5,000 minke whales for the 1973-74 Antarctic season (J.A. 170). When the Soviet Union took 4,000 minke whales and Japan took 3,713, the Secretary certified that both countries had acted to "diminish the effectiveness" of the IWC program. *Id.* President Ford made clear in his subsequent message to Congress that a taking of whales in excess of IWC quotas would bring the Pelly Amendment into play:

> Objections to adopted quotas are permitted by the terms of the Convention. An objecting country is not legally bound by the quota. Whether or not the objection is legal, however, does not alter the fact that *exceeding the quotas will diminish the effectiveness of the program. It constitutes a prima facie case for application of the Pelly Amendment.*

White House Press Release, January 16, 1975 (J.A. 175) (emphasis supplied).

In late 1978, the Secretary of Commerce certified Chile, Peru and the Republic of Korea for exceeding IWC quotas. Letter from Secretary of Commerce to the President (Dec. 14, 1978) (J.A. 177-86). None of the three countries were IWC members at the time. *Id.* The threatened imposition of Pelly Amendment sanctions brought commitments from all three nations to join the IWC by the next annual meeting. President's Report to Congress on the Certification of Chile, Peru and the Republic of Korea, at 3 (J.A. 193, 195).

Yet Congress was not satisfied. The President had exercised his discretion in all five cases to withhold the import ban. See 22 U.S.C. § 1978(a)(4). Congress wanted automatic certification *and* automatic sanctions. So it determined to close the loophole in Pelly by the Packwood-Magnuson Amendment, 16 U.S.C. § 1821(e)(2). Its object was bold. It wanted nothing less than to stop whaling in derogation of IWC quotas everywhere in the world.

As the Packwood-Magnuson hearings and debates make crystal clear, Congress knew what it was doing. It realized it would affect United States relations with other countries by cutting off the Executive Branch's ability to compromise whale conservation in the interest of other foreign policy concerns. Indeed, this was Congress' avowed purpose. Packwood-Magnuson was a conscious decision by the Legislative Branch sharply to limit the discretion of the Executive in order to ensure the effectiveness and integrity of the Convention process.

The Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 405, 93 Stat. 395, 403 (1979), was approved on the same day as the Packwood-Magnuson Amendment, Pub. L. No. 96-61, 93 Stat. 407 (1979). In the first, Congress again asked the IWC to agree to a "moratorium on the commercial killing of whales." 93 Stat. 403. Pub. L. No. 96-60 identified several foreign countries, including Japan, as offenders against the effort to stop whaling and urged them to comply voluntarily with the moratorium. 93 Stat. 404.

Packwood-Magnuson was a companion piece to the declaration in Pub. L. No. 96-60. It made clear that there would be a price to nations which chose not to comply with IWC quotas—the loss of fishing privileges in the fishery conservation zone off the coasts of the United States.

IV. THE IWC MORATORIA

Congress acted none too soon. By the 1970's, it had become apparent that the long-term effects of earlier whaling had been even more devastating than anticipated, and that too little was known about how—or even whether—the remaining populations could manage to survive.[11]

A. The Sperm Whale Ban

The ominous gaps in man's knowledge of whale demographics was most evident in the case of the Western Division Stock of North Pacific sperm whales—the very stock harvested to this day by the Japanese under the Baldrige-Murazumi agreement at issue here. As early as 1971, the IWC's Scientific Committee concluded that existing population models were flawed and that in fact the male sperm whale population had fallen to levels at which there appeared to be "little or no further surplus." [12] In 1976, the Scientific Committee was unable to establish firm quotas for male sperm whales; [13] based on the fragmentary data that did exist, the IWC adopted an interim "zero" quota for adult males and allowed a limited harvest of 763 adult females.[14] In 1979, the lack

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[11] It became increasingly suspected, for example, that whales belonging to different stocks and sub-populations of one species did not interbreed, thereby making the overall number of whales of one species a crude and misleading measure of reproductive potential. *See, e.g.*, Scarff, *supra* n.3, at 334-35 and nn.26-28.

[12] 22nd Annual Report, Int'l Whaling Comm'n, Scientific Committee, Summary and Recommendations to the Commission, Section B, ¶¶ 7, 9 (1972).

[13] 28th Annual Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(ii)(c) (1978).

[14] *Ibid.* These interim quotas stood in marked contrast to the quotas established only several years earlier: 4,000 males and 6,000 females. See 24th Annual Report, Int'l Whaling Comm'n, Appendix III, Chairman's Report ¶ 18 (1974).

of validated population models and apparent reductions in pregnancy rates led to a "zero" quota for females [15] and to a proposal, which failed of adoption, for a three-year moratorium in light of the "scientific uncertainty and the amount of biological material still remaining to be analyzed." [16]

In 1981, the IWC finally voted to reduce the quota for the Western Division Stock of North Pacific sperm whales from 890 adult males to zero adult males (J.A. 65a). It also voted to amend the Schedule to provide that no sperm whales could be taken from the North Pacific Stock in any future year unless the IWC acted to establish a quota for that year.[17]

The vote on these proposals was 25 to one, with Japan casting the only vote in opposition (J.A. 129).[18] Japan then filed its formal objection to the amendment.

B. The General Moratorium

The lacunae in biological information made the determination of sustainable yields unreliable for other species as well.[19] Yet, during the 1970's, the IWC continued

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[15] 30th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 10.2 (1980).

[16] *Id.* at ¶ 10.

[17] Under previous IWC procedure, the absence of a quota for a particular year ordinarily would mean either that whaling for that species or stock was unrestricted or that the previous year's quota remained in effect.

[18] *See Review of the 33rd International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981).

[19] A case in point involved Bryde's whales. In 1975 the Scientific Committee drew attention to the critical lack of information on Bryde's whales in the North Pacific—a stock now open to Japanese hunting under the Baldrige-Murazumi exchange. 27th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 8 (1976). In 1976 and

to permit the taking of species and individual stocks under specific numerical quotas. Although the quotas were a desperately needed improvement over the disastrous blue-whale-unit system, there developed a growing concern that even scrupulous adherence to the quotas could not guarantee the long-term survival of the whales.

At its July 1982 annual meeting, therefore, the IWC took the supreme, culminating regulatory step. It ordered a moratorium on all commercial whaling, which had been long sought by the Congress, to commence in 1986. A three-year phase-in was allowed, in a major concession to accommodate the objections of the whaling nations.[20] And as a further compromise, Japan was granted a two-year relief period—for the 1982-1983 and 1983-1984 seasons—from the IWC's decision in 1981 to ban sperm whaling in the North Pacific on the Western Division Stock.[21]

1977, the IWC was forced to set a "zero" quota for Bryde's whales in the Southern Hemisphere "pending a satisfactory estimate of stock size." 28th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(i)(d) (1978); 29th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 11(i)(d) (1979).

[20] Dr. John Byrne, the Administrator of NOAA and U.S. Commissioner to the IWC at the time, stated that the IWC "went to considerable lengths to ease the problems which cessation of whaling would bring to the whaling nations. Not only was the starting date set for 1986 (the '85-'86 Antarctic season), but it was agreed to review the situation in 1990 to determine whether it is workable." 8 *Marine Mammal News*, No. 7, at 2 (July 1982). *See* United States Marine Mammal Comm'n, Annual Report to Congress, Calendar Year 1982, at 24.

[21] The United States Marine Mammal Commission described the "compromise" nature of Japan's two-year sperm whaling allocations in its 1982 Report to Congress, *id.* at 25; *see also Review of the 34th International Whaling Comm'n Meeting, Hearings before the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 17-18 (1982) (committee staff report).

The IWC's moratorium was described by NOAA Administrator Byrne as "unmatched in the [IWC's] history" and as the "best evidence we could have that whales will receive that protection we have urged for so long." [22]

On October 21, 1982, Japan filed its objection to the moratorium.

V. JAPAN'S DEFIANCE OF THE IWC'S DECISION AND THE UNITED STATES' RESPONSE

A. Secretary Baldrige's Position Prior to November 1984

Japan continued to take sperm whales in the 1982-83 and 1983-84 seasons. Its objection to the original ban remained in effect. Japan gave every indication of defying the decision of the international community to desist from further whaling. Accordingly, on June 28, 1984, as the 1984-85 sperm whale "season" drew near, Senator Robert Packwood wrote to Secretary Baldrige seeking assurances that the Secretary would certify any commercial whaling that occurred after the IWC moratorium took effect (J.A. 197). Secretary Baldrige responded that certification would be forthcoming, "since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC." (J.A. 198). Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984).

B. Mr. Baldrige's Deal with Japan

The Secretary changed his mind, however, in less than four months. In the November 13, 1984 Baldrige-Murazumi exchange he agreed not to certify just such a "foreign government." Altogether, his letter constituted a special license to Japan to kill 1,200 sperm whales from

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[22] Statement of Hon. John V. Byrne, *Review of the 34th IWC Meeting, supra* n.21, at 31-32.

the protected Western Division stock between 1984 and 1988, and untold thousands of minke and Bryde's whales, all in palpable violation of the IWC decision.[23]

The step was without precedent. Never before had an Executive Branch official purported to suspend the operation of Pelly or Packwood-Magnuson as to an admitted violation of any whaling quota—and certainly not with respect to the supreme regulatory act of a worldwide moratorium.

In exchange for the Secretary's forbearance, Japan agreed to withdraw its objections—effective 1988—to the IWC's 1981 sperm whale ban and 1982 general moratorium (Pet. App. 102a-119a). But contrary to petitioners' representations, Japan did *not* agree to "dismantle its commercial whaling *industry*" (Fed. Br. 13). It is already pressing to ensure that the IWC completes its reevaluation, as contemplated in the IWC Schedule par. 10(e), by 1990, in the evident hope that the moratorium on commercial whaling may come to an end and its "industry" continue. Even as to interim whaling between 1988 and 1990, it is by no means certain that Japan's "industry" will be shut down. Within weeks of the Baldrige-Murazumi agreement, Japan proposed to an IWC Working Group a new category of sperm and Bryde's whaling off its coast that would be called "coastal subsistence whaling" instead of "commercial"

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[23] Federal Petitioners' argument (Fed. Br. 43 n.50) that the killing of these whales is a "prudent price to pay" has little factual support. The IWC's Scientific Committee, so heavily relied on by petitioners (Fed. Br. at Addendum II), concluded that it was "unable to agree on what the long term effects" on the sperm whale population were likely to be. Yet it is precisely such long-term effects that are of crucial concern to a species listed as endangered with worldwide extinction. See Respondents' Motion to Expedite, 85-954, 85-955, Exhibits B & C. It is significant that petitioners fail to offer even short-term comfort from the Scientific Committee as to Japan's killing of 357 Bryde's and 1,941 minke whales during each of the 1986 and 1987 seasons.

whaling and hence not be covered by either the 1981 sperm whale ban or the 1982 general moratorium. *See* Brief in Opposition to Petition for Writ of Certiorari. Nos. 85-954, -955 at 4 n.2. And Japan may well issue itself a permit for "scientific" whaling, as it has in the past, *see Scarff*, *supra* n.3, at 356 n.157, and as to which there is no control under the Convention. Moreover, Secretary Baldrige has already stated that fishing activity by United States citizens is expected to increase considerably by the end of the decade, displacing foreign fishing in U.S. waters (J.A. 111). Thus, Japan will have far less to lose from invocation of Packwood-Magnuson in 1988 than it does today.

As the Baldrige-Murazumi agreement was being negotiated, respondents, a consortium of twelve nonprofit conservation and animal welfare organizations and one individual, filed this complaint. On March 5, 1985, the district court ordered Secretary Baldrige to fulfill his statutory obligations and to certify Japan (Pet. App. 56a-84a). On August 6, 1985, the Court of Appeals affirmed (Pet. App. 1a-55a).

SUMMARY OF THE ARGUMENT

The controlling issue is whether under the 1979 Packwood-Magnuson Amendment the Secretary of Commerce may determine that Japan's refusal to abide by the IWC's worldwide moratoria did not diminish the effectiveness of the Whaling Convention.

The plain language of the statute is otherwise; a flagrant violation of the IWC's moratoria, the supreme and culminating regulation of commercial whaling, must by definition diminish the Convention's effectiveness. The Executive Branch has told the courts that even lesser quota violations would. Respondent Baldrige himself has written the author of Packwood-Magnuson that he agrees.

That Amendment was enacted against a background of administrative practice under the Pelly Amendment that quota defiance consistently triggered automatic certification. Congress, in enacting Packwood-Magnuson, sought and obtained from the Department of Commerce assurance that such defiance would continue to be certified as "diminishing the effectiveness of the Convention." The central purpose of Packwood-Magnuson was to eliminate the loophole in the Pelly Amendment to which the Executive Branch had regularly resorted to withhold sanctions from certified countries—not to create a new loophole. The Executive plea at the time for "some flexibility to respond proportionally to the nature and scope of the particular offense" was rejected. Respondent Baldrige's contention now that he has discretion to withhold sanctions is an effort to confer on himself the very discretion his predecessor sought and was denied when Congress passed Packwood-Magnuson. The use of the phrase "diminish the effectiveness" in other statutes supports Congress' intention in Packwood-Magnuson.

The Secretary also suggests, as a fallback, that the courts should desist from enforcing even an unqualified congressional mandate if that mandate touches international relations. The notion is without precedent, and ominous in its implication that the Executive Branch can slip the congressional bridle by making agreements with other nations.

ARGUMENT

I. SYSTEMATIC DEFIANCE OF THE IWC MORATORIA IS A PER SE DIMINISHMENT

A. The Executive Branch Is Not Above the Law Just Because Its Action Affects Foreign Affairs

Justice Jackson said that the foreign affairs authority of the Executive Branch is "at its maximum . . . [when done] pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). It

is at its "lowest ebb . . . [when] incompatible with the expressed or implied will of Congress." 343 U.S. at 637 (Jackson, J., concurring). Those rough classifications are as commonsensical and as analytically useful in this instance as they were in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). It is the essence of our claim and of the holdings of both lower courts that the Secretary of Commerce acted incompatibly with the will of the Congress. Thus, the Baldrige-Murazumi arrangement does not lie in "an area where Executive discretion and authority are at their zenith" (Fed. Br. 42), but rather at the opposite end of the Jacksonian spectrum.

Dames & Moore demonstrates that the scope of executive authority is not resolved merely by invoking the mystique of foreign affairs. It is really too late to contend as petitioners do that the Executive Branch has a monopoly on constitutional responsibility in the vast external realm. Foreign relations is a divided power.

> "The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that the Congress is a coequal branch of government is the dominant fact of national politics today." Secretary of State Henry A. Kissinger, Dept. of State Bull. LXXII, 562 (1975).

Thus, although the validity of an executive agreement of the highest international importance was at stake in *Dames & Moore*, nowhere did this Court subscribe to the petitioners' arguments here that the Executive Branch's conduct was " 'largely immune from judicial inquiry or interference.' " (Fed. Br. 48, J.W.A. Br. 43, both quoting *Regan* v. *Wald*, 104 S. Ct. 3026, 3039 (1984)). Instead, this Court held that it "cannot ignore the general tenor of Congress' legislation . . . in trying to determine whether the President is acting alone or at least with the acceptance of Congress." 453 U.S. at 678. The President's actions were upheld in *Dames & Moore* only after

the Court was able to conclude on the basis of a most scrupulous review of the legislative record that the interpretation of the relevant statutes was not undermined by a "contrary indication of legislative intent," and was supported by a "history of congressional acquiescence in conduct of the sort [now] engaged in by the President." *Id.* at 678-79.

In this case, Congress has never acquiesced "in conduct of the sort engaged in" by the Secretary of Commerce here. To the contrary, the Packwood-Magnuson Amendment was consciously designed to make such a result impossible.

Federal Petitioners may think Congress erred. They strenuously contended as much at the time—and lost. Evidently they continue to hold that they should be permitted to exercise their special talents and judgment because relations with another nation are in question. This is not an unusual fancy of the Executive Branch in the perpetual struggle between Executive and Legislature over the foreign affairs power. But Congress here had the undoubted power to legislate an automatic sanction. From the Commerce Clause, from the Property Clause, even from its responsibility to punish affronts to the law of nations, its authority to determine whether foreigners might take the living resources of the 200-mile fishery conservation zone of the United States is manifest. And so too is its power to condition that privilege, as it did here, even to the point of making its loss automatic if a nation decided to ignore a worldwide whaling ban of the IWC.

If the Executive Branch wishes to insist on discretion under Packwood-Magnuson, it should carry the issue back to the Hill. For now, there is an overwhelming "contrary indication of legislative intent." Congress has spoken, as we shall now proceed to show, and under *Dames & Moore* its voice is decisive.

B. The Baldrige-Murazumi Undertaking Offends the Plain Language of the Statute

Packwood-Magnuson says that the Secretary of Commerce shall certify whaling that "diminishes the effectiveness" of the Convention. The courts below saw in this a plain and straightforward meaning. They held that a nation's knowing contravention of the IWC moratoria necessarily and by definition "diminished the effectiveness" of the IWC and the Convention.

There is hardly much room for rational argument to the contrary. The IWC is the body delegated by multinational agreement to implement the Convention's objectives. Its principal purpose is to determine the appropriate level of whaling. The IWC decided in 1982 to suspend all sperm whaling in 1984 and all whaling of any species by 1986. This was the most important action ever undertaken under the Convention. It was the supreme, culminating regulatory measure, the very capstone of the international regulatory system. Yet, the Secretary of Commerce of the United States has now endorsed Japan's continued slaughter of thousands of whales over an additional four-year period. By the stroke of a pen, he has purported to eliminate the principal sanction behind the Whaling Convention. Petitioners are hard put to suggest that this defiance of the IWC's decision by Japan, endorsed by the United States, enhances the prestige or strengthens the authority or adds to the reputation and weight of either the IWC or the Convention. It would be difficult to imagine any action which more clearly "diminishes the effectiveness" of the international system.

Nor has either set of petitioners tried very hard to justify the action in Packwood-Magnuson terms. Instead, they argue around the statutory formula. The Secretary of Commerce, they say, had unlimited discretion to decide whether another nation had affronted Congress' standard. In doing so, he may weigh any consideration whatever, even setting off the conservation of the great

whales and the integrity of the Convention process against the political need to avoid "disharmony among nations." (Fed. Br. 44-45.) This is precisely what Congress intended to avoid. To allow it is to rewrite the law.

The extent to which the Secretary would replace Congress' scheme with his own becomes clear from his stretched-out transition period for the Japanese to terminate "commercial" whaling. The fact of the matter is that the statute lays down its own precise timetable for compliance. If a nation diminishes the Convention's effectiveness, it is certified and its fishing allocation in United States waters cut "by not less than 50 percent." 16 U.S.C. § 1821(e)(2)(B) (1982). The certification initiates a 365-day "remedial period" within which the offending nation is to bring itself into compliance with IWC policy. *Id.* at (A)(ii). If it is established within that 365-day period that the reason for the certification no longer exists, the reduced allocation is reinstated. *Id.* at (C)(iii). If not, the reduction becomes permanent and the Secretary of State "may not thereafter make any allocation to that country . . . until the certification is terminated." *Id.* at (D)(ii).

In the face of this carefully crafted and clearly defined procedure, with its absolute one-year time limit, it can hardly be said that a promise to comply four years hence could suspend the requirement of Packwood-Magnuson certification. Yet the Secretary argues that he has discretion to withhold certification altogether, thus nullifying the one-year limit, in exactly the same circumstances. His ad hoc creation of a four-year "remedial period" is prohibited by the express and unambiguous words of the statute.

In short, the Secretary's action offends the statute on its face.

C. The Legislative History Confirms that the Secretary Has No Discretion To Endorse Intentional Whaling in Excess of IWC Quotas

Petitioners' position comes down to the proposition that the phrase "diminish the effectiveness" is an empty vessel, which the Secretary may fill with any meaning that he in his "informed discretion" may desire. We do not contend that the Secretary lacks the capacity to discriminate between improper nonquota whaling practices which require certification because they diminish the Convention and those that do not, but he has no discretion to ignore his mandate with respect to the baseline case of zero IWC whaling quotas. This was the culminating regulatory step. By a stroke, it made all previous measures academic. If defiance of the total ban would not diminish the effectiveness of the Convention, nothing would. The words of Congress would be drained of meaning. Petitioners' reading of the statutes offends their clear intention. An objective review of the legislative history can lead to no other conclusion.

As stated, from 1971 to 1979, five certifications occurred under the Pelly Amendment—all for the killing of whales in excess of IWC quotas. In each case the President exercised his statutory discretion to withhold economic sanctions. Congress adopted the Packwood-Magnuson Amendment to ensure that nations violating quotas under the circumstances that had triggered the previous Pelly Amendment certifications would lose their fishing privileges in United States waters. And, Congress sought and obtained from the Commerce Department during congressional hearings an explicit agreement that the statute required—mandated—certification of any country that intentionally permitted its nationals to exceed IWC whaling quotas, as we shall now demonstrate.

1. *The Pelly Amendment*

The single point emphasized throughout its legislative history is that the Pelly Amendment sanctions were cre-

ated for the express purpose of enforcing international fishing restrictions. It was intended to put teeth into international programs that lacked enforcement power of their own. By 1971, the immediate crisis was the overfishing of Atlantic salmon by nations—primarily Denmark, West Germany and Norway—that were members of the International Convention for the Northwest Atlantic Fisheries ("ICNAF"). Those nations had frustrated ICNAF attempts to control high seas salmon fishing by using the treaty's "objection" procedure similar to the opting out mechanism in the Whaling Convention. *See* 117 Cong. Rec. 34,752 (1971).[24] The House Committee Report confirms the intended purpose to provide assured enforcement of the "ICNAF ban on the taking of Atlantic Salmon now in force . . . ." H.R. Rep. No. 468, 92d Cong., 1st Sess. 8 (1971). The other quotas that Congress expressly intended to support were those governing the commercial killing of whales:

> The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proven to be a cloak for over-exploitation on a grand scale.
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> . . . .
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> [T]he Committee has defined the term "fish products" to include marine mammals. As I have just

[24] It is nonsense to argue, as Intervenor Petitioners do, that these statutes should be construed not to apply to nations that exercise objection privileges under a treaty in order to establish exemption from quotas. Such exemption claims were precisely the evil that Congress sought to end. Nor is there any merit to the argument that the statutes, as applied, would violate the Convention. No provision of the Convention obligates other parties to honor a nation's objection or to withhold economic pressure on that nation to comply with IWC quotas. Therefore, the case is indistinguishable from *Moser v. United States*, 341 U.S. 41, 45 (1951).

> indicated, whales are the most notable example of an over-exploited living marine resource.

117 Cong. Rec. 34,752 (1971) (statement of Rep. Pelly).

Congress conceived that it was imposing a nondiscretionary obligation on the Secretary of Commerce to certify activity that Congress regarded as "diminishing the effectiveness" of a marine resource conservation treaty—namely, intentionally failing to comply with restrictions on harvesting. The wording of the statute is unequivocally mandatory:

> *When* the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishing conservation program, the Secretary of Commerce *shall certify* such fact to the President.

22 U.S.C. § 1978(a)(1) (1982) (emphasis added). This mandatory duty is restated repeatedly in alternative phrasings throughout the legislative history:

> Section 8(a) of the Act would provide that whenever the Secretary of Commerce determines that nationals of a foreign country are conducting fishing operations in a manner which diminishes the effectiveness of an international fishery conservation program under an agreement to which the United States is signatory, then the Secretary of Commerce *would be required* to certify this fact to the President of the United States.

117 Cong. Rec. 34,751 (1971) (statement of Rep. Dingell) (emphasis added).

> Section 8(a) provides that whenever the Secretary of Commerce determines foreign nationals are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, *he must*

> *certify* this fact to the President of the United States.

117 Cong. Reg. 47,053 (1971) (statement of Sen. Stevens) (emphasis added).

> Section 8(a) *directs the Secretary of Commerce to certify* to the President the fact that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program whenever he determines the existence of such operations.

H.R. Rep. No. 468, *supra*, at 6 (emphasis added).

Only by a linguistic miracle can the phrases "shall certify," "would be required to certify," "must certify" and "directs the Secretary of Commerce to certify" be transformed to mean that the Secretary has the discretion to elect not to certify a nation engaged in the very activity to which the statute was directed—the intentional contravention of international fishery conservation quotas.

2. *Enforcement of the Pelly Amendment*

The Secretary has long understood that, under Pelly, any diplomatic efforts must operate within, and not contrary to, the international conservation system. Upon enactment of the Pelly Amendment, the United States undertook immediate discussions with Denmark to resolve the Atlantic salmon dispute. In striking contrast to the 1984 whaling deal with Japan, the Secretary did not seek to bypass ICNAF. Instead, fully cognizant of the intent of Congress that the quota-setting authority of the international body be recognized and enforced, he agreed that the United States and Denmark should jointly propose that ICNAF adopt a four-year phase-out of high seas Atlantic salmon fishing. The four-year phase-out was adopted at a joint meeting of ICNAF in June of 1972 (A.A. at E-5, E-11).

Likewise, the 1974 certifications of Japan and the Soviet Union established the Secretary's understanding that the Pelly Amendment required certification of intentional contravention of IWC whaling quotas, even if the offending nation committed to adhere to the quotas the very next year. The factual background for the certifications is set forth in an appendix to the Secretary's certification letter:

> In the case of the minke whale, a quota of 5,000 whales was set for the Antarctic. . . . The Soviet Union and Japan voted against this quota, stated their view that the figure should be 8,000, took formal objection to the quota and announced that each would take 4,000 minke whales during the 1973-1974 season. In fact, the Soviet Union took 4,000 and Japan took 3,713. This represented an excess of 2,713, or approximately fifty percent over quota.

(J.A. 170.) However, at the annual meeting of the IWC in June 1974, both nations switched positions, voting in favor of the quotas adopted for the 1974-1975 season. (J.A. 171.) On October 3, 1974, the IWC notified all members that no nations had filed objections to the quotas adopted at the June 1974 meeting. *Circular Communication to All Contracting Governments*, October 3, 1974, 25 U.S.T. 2978 (A.A. at F).

Thus, by October 3, 1974, both Japan and the Soviet Union were bound and committed to adhere to the 1974-75 quotas. Indeed, the Secretary recommended in the certification letter that no economic sanctions be imposed because "there appears to be sufficient likelihood of compliance with future conservation programs by the U.S.S.R. and Japan." (J.A. 172.) He nonetheless recognized his statutory duty to certify the two nations for failing to comply with the IWC quotas the preceding year:

> I hereby certify under the Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978

> (1971), that the minke whale catches of the U.S.S.R. and Japan during the 1973-1974 season exceeded the International Whaling Commission (IWC) quotas for that season, *thereby diminishing the effectiveness of the conservation program of the Commission.*

Letter from Secretary of Commerce to the President (Nov. 12, 1974) (J.A. 168) (emphasis added).

Four years later, on December 14, 1978, the Secretary of Commerce reconfirmed that intentionally exceeding IWC quotas necessarily diminishes the effectiveness of the IWC, when he entered the certification of Peru, Chile and South Korea:

> By this letter, I am certifying that nationals of Peru, Chile and the Republic of Korea are conducting whaling operations in a manner and under circumstances that diminish the effectiveness of International Whaling Commission (IWC) conservation programs. This decision was based on the fact that those countries are not members of the IWC and their nationals harvest whales substantially in excess of IWC quotas established to protect whales from overharvesting.

Letter from Secretary of Commerce to the President (Dec. 14, 1978) (J.A. 177). Again, assurance of future compliance already had been obtained. The certification letter disclosed that all three countries had stated their intention to join the IWC—Peru had ratified the Convention, ratifying legislation was pending in Korea and expected to pass by the end of the month, and Chile was preparing to introduce similar legislation. (J.A. 177-78, 182-83.) Yet, again, the Secretary recognized the mandatory statutory duty to certify those nations for failing to comply with previous IWC quotas.

The grounds for certifying Chile are in stark contrast with Japan's taking of 1,200 sperm whales over a four-year period:

> [I]nformation received in the last several months leads to the conclusion that Chilean actions are diminishing the effectiveness of IWC whale conservation programs. Notwithstanding the prohibition against taking sperm whales during the 1976-1977 season in the southern hemisphere division where Chilean vessels hunt, *figures received from the Chilean government through the U.S. Embassy show a catch of 76 sperm whales by Chilean nationals in 1976-77*

Id. (J.A. 185) (emphasis added). Seventy-six whales, in other words, were enough.

3. *The Packwood-Magnuson Amendment*

In each of the five certifications in 1974 and 1978, because the President was satisfied by assurances of *immediate* compliance—*the very next year in each case*—he exercised his clear discretion under the Pelly Amendment not to impose economic sanctions on the offending nations. (J.A. 175-76, 195-96.) Packwood-Magnuson was enacted in direct response. Its purpose was to create an automatic, nondiscretionary consequence to exactly the circumstances that led to the 1974 and 1978 certifications.

In the congressional consideration of what became the Amendment, there was no hint that the Executive conceived that it would have discretion to refuse to certify quota violators. Congress was focusing on what it saw as quite another loophole—the admitted freedom of the President to impose or refuse sanctions after certification. To eliminate the Pelly escape mechanism would have been a misguided exercise indeed if that same discretion could have been brought in by the backdoor of the certification process. But Congress' intent to make the sanction automatic in core cases of quota violations was clear:

> Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishery agreements. The major weakness has been that certification does not necessarily impose

> any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty.
>
> In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification.

125 Cong. Rec. 22,083-84 (1979) (statement of Rep. Oberstar).

Petitioners aver that "[n]owhere in the legislative history is there an express authoritative statement that the Secretary must certify every nation that departs from international conservation quotas" (Fed. Br. 13). Examination of the hearings on Packwood-Magnuson reveals otherwise. Congress sought and obtained from the Department of Commerce witness agreement that certification is mandatory and nondiscretionary with respect to intentional contravention of IWC quotas. On June 4, 1979, Richard A. Frank, Administrator of the National Oceanic and Atmospheric Administration, testified as follows in House of Representatives hearings:

> Mr. McCLOSKEY. . . . [A]s I read the law, and let me cite it again, which says that the Secretary of Commerce shall certify, and then that the President may invoke sanctions, it seems to me we put a duty on you to do something.
>
> . . . .
>
> Now, it seems to me the discretion then is left with the President and the Secretary of Treasury, not with the Secretary of Commerce. If you have determined, as you in your testimony indicate, that Japan is importing non-IWC whale products, I do not see where you have any discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change.
>
> It seems to me that is a State Department discretion. What is your comment on that?
>
> Mr. FRANK. I am not sure that, first, with respect to the latter discretion it is just the State De-

partment. We are involved very much in that decision, too.

Mr. McCLOSKEY. And as should be. *But the certification is a mandatory act under the law. It is not a discretionary act.*

Mr. FRANK. *That is correct.*

. . . .

Mr. BREAUX. I understand, Mr. Frank, that actually what we are talking about under the Pelly amendment is a two-stage process. First, *if a country is violating the terms of an international treaty, the Secretary of Commerce has to certify that he is doing that, and that is not a discretionary thing.* But after he certifies that there is a violation, and there is discretion on the part of the President to impose any import quotas, or the elimination of any imported fish products from that country and, the second part is the optional authority that the President has.

Mr. FRANK. *That is correct. The first one is mandatory on the Secretary of Commerce. The second is discretionary on the part of the President.*

. . . .

. . . The specific language is, we must find that the country is engaging in trade or taking which diminishes the effectiveness of any program for an endangered or threatened species. You need not, under this, be violating the treaty.[25]

Petitioners rely (Fed. Br. 37 & n.46) on isolated quotations out of context to argue for discretion in the Secretary. Admittedly, though his discretion under the statute is not so broad as to permit him to sacrifice whale conservation to diplomatic good will, the Secretary has the

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[25] *Whaling Policy and International Whaling Commission Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 301, 322-23 (1979) (J.A. 203-04) (hereafter cited as "*1979 Oversight Hearings*") (emphasis added).

responsibility to draw the line between those nonquota whaling practices that diminish the effectiveness of the Convention process and those that do not. But this is the most that can be made of the quotations on which Federal Petitioners rely. There was extensive interrogation of NOAA Administrator Frank during the House hearings concerning the distinction between an intentional defiance of quotas, which would require automatic certification, and violating nonbinding IWC resolutions, which the Secretary might in his discretion also certify:

> Mr. BREAUX. . . .
>
> Have we not used our authority under the Pelly amendment to get the attention of some of these countries with regard to their apparent—very serious violations of the intent and the actual law concerning the IWC provisions?
>
> Mr. FRANK. We have used the Pelly amendment most recently in connection with . . . Peru, Chile, and South Korea. They were the most flagrant violators *because they were taking whales without regard to IWC quotas*. . . .
>
> . . . .
>
> IWC resolutions are not binding. *If a country were violating something in the schedule, for example, taking more whales than the schedule provides, and that were a significant violation, I believe it is clear that the Pelly amendment would apply.* I think it is a more difficult question if a country is violating something that is a recommendation but not binding.

1979 Oversight Hearings 311-12 (J.A. 200-01) (emphasis added).

> Mr. McCLOSKEY. In your testimony you have found that Japan is in violation, have you not?
>
> Mr. FRANK. No sir, we have not, and the reason we have not is that there is a more subtle issue here. *They are not violating an IWC quota or an IWC prohibition.*

> Mr. McCLOSKEY. Wait a minute. Indirectly?
> Mr. FRANK. They are not indirectly violating a quota. What they are doing is acting inconsistently with a nonbinding resolution.

Id. at 323 (J.A. 204) (emphasis added).

Petitioners point to references by Representative Breaux to the Secretary's "discretion" (Fed. Br. 37-38 & n.46). Examined in context, the quotes reveal that Representative Breaux understood that "discretion" existed only with respect to activities other than the intentional contravention of whaling quotas:

> No. 1, I would take it that even if we make it mandatory there is still somewhat a degree of discretion within the certification process as to whether a country is in violation of the terms of the international agreement and that is always going to be there; and I want you to address that point; because apparently Richard Frank was talking about the problem they are having right now with countries, member countries to the IWC that are not following what they would like them to do in the sense of making data available on the count of the whales, in addition, on the countries importing of whale meat.
>
> . . . .
>
> *Apparently Dick Frank is saying that the taking of whales in violation of IWC quotas is something that automatically would require the Department of Commerce to certify that nation as being in violation of the taking provision.* Then you get into two other categories, not supplying enough data and the importation of whale meat.

1979 Oversight Hearings at 359 (remarks of Rep. Breaux) (emphasis added).

There is not one word by Representative Breaux, or by anyone else, in the legislative history of the Packwood-Magnuson Amendment that suggests certification is not mandatory with respect to the one practice to which the

Pelly and Packwood-Magnuson Amendments were particularly addressed and which under any conceivable interpretation of Congress' instruction "diminishes the effectiveness of" the IWC—the intentional contravention of IWC quotas. As Representative Bonker made clear to another Administration witness, Deputy Assistant Secretary Negroponte of the State Department, the purpose of Packwood-Magnuson was to cause the loss of fishing privileges in exactly the same circumstances as had triggered the five prior Pelly Amendment certifications:

> Mr. BONKER. The second objection you cite concerns lack of discretion or flexibility in the implementation of that amendment.
>
> Would you not agree that the reason the Packwood amendment has been advanced is because the discretion that now rests with the President has not been used effectively. In other words, the discretion is there to impose and invoke the Pelly amendment, but even under justifiable circumstances it has not been done. *So Congress is simply moving in a more specific way to mandate it.*[26]

(J.A. 218.)

4. *Congress' Rejection of Petitioners' Arguments for Executive Discretion*

Federal Petitioners urge that the Executive Branch be allowed to apply "its special knowledge of foreign relations, conservation dynamics, and treaty requirements to assure the maximum effectiveness of the ICRW"; they entreat (Fed. Br. 44-45) that "[a] strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts." Federal

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[26] *Fishery Conservation and Management Act: Oversight Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 313, 323 (1979) (hereinafter cited as "*Fishery Conservation Oversight Hearings*") (J.A. 209, 218) (emphasis supplied).

Petitioners made the same argument to Congress in 1979. But in contrast to the interpretation now argued to this Court, the State Department claimed then that the Amendment was too iron-clad. Deputy Assistant Secretary of State Negroponte testified that the bill that became Packwood-Magnuson:

> appears to provide *little flexibility or discretion* in its implementation.
>
> . . . .
>
> [W]hat the Packwood amendment does is perhaps go a bit too far in *tying the administration's hands in its ability to deal with these problems on a diplomatic basis.*

Fishery Conservation Oversight Hearings at 313, 323 (emphasis supplied). The Commerce Department also argued: "[Packwood-Magnuson] should be modified to allow some flexibility to respond proportionately to the nature and scope of the particular offense." *Id.* at 314 (J.A. 210) (statement of Eldon V.C. Greenberg, General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce). The State Department specifically proposed creating a delayed compliance period prior to sanction:

> Mr. NEGROPONTE: I think if we could decouple the certification process from the process of actually reducing allocations so that once there has been a certification, there is time then to go to Japan or any other country and say, look, this step has been taken. Do you realize if you don't do anything to remedy the situation which caused it, that next year we will be forced to reduce your allocations?

Id. at 325 (J.A. 220).

Congress not only rejected these arguments, it further revised Packwood-Magnuson after this testimony to provide for *immediate* partial suspension of fishing quotas under permits already issued rather than only a prohibition on issuing new permits after a certification. Con-

gress explicitly opted for sanctions first, negotiation later —just the opposite of the State Department proposal. To revisit the issue, the Executive Branch should address the Congress, not this Court.[27]

5. *The Similar Wording in Other Statutes*

In contrast to their near-total silence regarding both the Packwood-Magnuson hearings and the consistent history of Pelly Amendment administrative enforcement, Federal Petitioners devote considerable emphasis in their brief to their interpretation of similar language in other statutes. Respondents submit, first, that these statutes are of marginal relevance to this case. Congress in 1979 had a single, unmistakable and quite explicit intent in enacting Packwood-Magnuson—to cause the automatic revocation of fishing privileges in the quota-violation circumstances leading to the five earlier Pelly Amendment certifications.

And if the phrase "diminish the effectiveness" elsewhere sheds light on Packwood-Magnuson, the comparison confirms our position. The 1984 Eastern Pacific Tuna Licensing Act ("EPTLA"), 16 U.S.C. §§ 972-972h (Supp. II 1984), was enacted to implement the Eastern Pacific Ocean Tuna Fishing Agreement ("EPOTFA"). During

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[27] Intervenor Petitioners' argument that Packwood-Magnuson constitutes an unconstitutional delegation of legislative power to the IWC is patently frivolous. (JWA Br. 28-32.) The governing precedent is *United States* v. *Sharpnack*, 355 U.S. 286 (1958), which holds that Congress may constitutionally incorporate by reference the prohibitions and regulations adopted by other legislative bodies. Although *Sharpnack* expressly approved incorporation by reference of state law, the general principle has long been relied on by Congress to incorporate into the laws of the United States the provisions of international fisheries and wildlife conventions. *See, e.g.*, Northern Pacific Halibut Act of 1982, 16 U.S.C. §§ 773, 773e (enforcing regulations adopted pursuant to Convention between the United States of America and Canada for the Preservation of the Halibut fishery of the Northern Pacific Ocean and Bering Sea, 5 U.S.T. 6 (1953)).

the late 1970's and early 1980's, the United States, in conflict with the coastal nations of Central and South America, recognized no right to restrict tuna fishing beyond the 12-mile territorial limit; nearly all of the coastal nations of Central and South America purported to regulate tuna fishing within 200 miles of shore. The result: a continuing cycle of seizures of U.S.-flag tunaboats, followed by retaliatory U.S. embargoes of tuna imports from the seizing countries. The EPOTFA was signed by the United States, Panama and Costa Rica on March 15, 1983 as a temporary resolution of that conflict.

Contrary to the Federal Petitioners' implication (Fed. Br. 39-41), it was not intended as a conservation agreement at all, but as a device to channel license fees to the Latin Americans.[28] In the words of the Senate Committee on Foreign Relations, in recommending Senate ratification of EPOTFA, "[t]he primary purpose of this agreement is to provide an international licensing arrangement for tuna fishing in a broad area of the eastern Pacific Ocean." S. Exec. Rep. 13, 98th Cong., 1st Sess. 1 (1983). The Agreement contemplated that all Eastern Pacific tuna fishing vessels must have a license from the EPOTFA Council. To obtain a license, each vessel would pay an annual fee based on its net registered tonnage. The aggregate fee amount was to be distributed at the end of each year to the Contracting Parties in proportion to the amount of tuna taken within 200 nautical miles of their coasts that year.

The EPTLA, enacted to implement EPOTFA, provides for compensation to American tunaboats seized for violation of EPOTFA, but only in the event that the Secre-

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[28] By its terms, the Agreement did not permit the EPOTFA Council to make even interim conservation recommendations concerning tuna resources until "the Contracting Parties include all States that harvest tuna in the eastern Pacific Ocean on a meaningful scale" in relation to conservation requirements. EPOTFA, art. III, para. (D); S. Exec. Rep. 13, 98th Cong., 1st Sess. 4 (1983).

tary of State determines that the violation which lead to the seizure "is not of such seriousness as to diminish the effectiveness of the Agreement." 16 U.S.C. § 972c. Since the "primary purpose" of the Agreement was licensing, Congress made clear that failure of a vessel to obtain a license would necessarily diminish the effectiveness of the Agreement and therefore bar compensation:

> *It is the Committee's view that while failure of a seized vessel to have a license must be considered an action which diminishes the effectiveness of the EPOTFA*, the seriousness of a violation of a conservation regulation would need to be determined by the Secretary.

Eastern Pacific Ocean Tuna Fishing Agreement, H.R. Rep. No. 721, 98th Cong., 2d Sess. 5 (1984) (emphasis added). This is precisely the distinction that Congress drew in Packwood-Magnuson in 1979, between the taking of whales in violation of IWC quotas "that automatically would require" certification, and lesser offenses that could invoke the Secretary's judgment whether the Convention was diminished.

The 1962 amendments to the Tuna Conventions Act also support Respondents' position and the interpretation of the courts below. Those amendments, 16 U.S.C. § 951 *et seq.*, instruct the Secretary of Commerce to promulgate regulations prohibiting tuna imports from countries whose nationals conduct fishing operations "in such a manner or in such circumstances as would tend to diminish the effectiveness of the conservation recommendations" proposed by the Inter-American Tropical Tuna Commission. 16 U.S.C. § 955(c) (1982). Federal Petitioners misleadingly suggest (Fed. Br. 23-24 & n.25) that regulations implementing *that standard* involve discretion. They are wrong.

The Tuna Convention Act Amendments create two separate standards, violations of which result in two different levels of tuna embargo. If a country's tuna vessels

are being used for fishing operations that "would tend to diminish the effectiveness of the conservation recommendations of the Commission" the Secretary of Commerce is required to prohibit the import from that country of fish of that species taken from the regulatory area. In the case of "repeated and flagrant fishing operations" that "seriously threaten the achievement of the objectives of the commission's recommendations," however, the Secretary is granted the *discretion* also to embargo other species of tuna. 16 U.S.C. § 955(c). The "frequent and flagrant" standard is not, as Federal Petitioners imply (Fed. Br. 22-24), identical to the "diminish the effectiveness" standard, and it alone imparts discretion.

Furthermore, the Executive Branch understood that violation of the Tuna Commission's conservation recommendations would necessarily "diminish the effectiveness" of the Commission and lead to an automatic embargo. As of 1962, enforcement of the Tuna Convention Act was the responsibility of the Department of Interior. Congress enacted the 1962 Amendments in express reliance on Department of the Interior assurances that the "diminish the effectiveness" standard would require an embargo of tuna from any country that failed to carry out the Tuna Commission conservation recommendations:

> Because the [Senate Commerce] committee regards these provisions as being of key importance, it is including the Department's statement at this point in the report so that the intended operation of the provisions may be clear. The statement follows:
>
> ". . . To implement these requirements in the legislation, the Department would consider the species of tuna subject to conservation regulations *ineligible for entry when any of the following conditions obtains in the country from which it is offered for entry*:
>
> . . . .
>
> "2. The country does not put into effect conservation measures applicable to its own fisher-

> men adequate for the implementation of the Commission's recommendtions."

Conservation of Tropical Tuna, S. Rep. No. 1737, 87th Cong., 2d Sess. 6-7 (1962) (emphasis added).[29] Thus, the court of appeals was absolutely correct in interpreting the 1962 Amendments to the Tuna Conventions Act as requiring that "[i]f a foreign country failed to implement the harvest recommendations, that failure would automatically result [in] imposition of the statutory sanctions on the foreign country." Pet. App. 28a.

Implementation of the 1962 Amendments, which petitioners pointedly fail to discuss, confirms the mandatory nature of an embargo when harvest recommendations are violated. In 1975 the Department of Commerce undertook an investigation of yellowfin tuna fishing in the

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[29] The quotation from this same document that is set forth at page 23 of Federal Petitioners' Brief is taken out of context from a discussion of the Department's intended method of proceeding with respect to nations that have already committed to carrying out the Commission's conservation regulations. With respect to those nations that failed to provide such a commitment at the outset the Department assured Congress it would impose an absolute bar on entry of any tuna that could not be *proved* not to have been taken in contravention of the Commission's recommendations:

> [W]e would plan to issue regulations which would require in effect that all tuna of the species covered by the conservation regulations offered for entry into the United States from countries from which we had not received adequate assurances be accompanied by documents. These documents would give such particulars as would demonstrate that the tuna were not ineligible for entry, i.e., proof that if caught by nationals of the exporting country, the tuna were not taken in the regulatory area or that adequate conservation measures were being carried out, and proof that, if caught by nationals of a third party, the tuna were not taken contrary to the recommendations of the Commission.

Conservation of Tropical Tuna, S. Rep. No. 1737, 87th Cong., 2d Sess. 7-8 (1962) (Statement of the Department of the Interior).

Eastern Tropical Pacific Ocean by nationals of several countries after the season had been closed. With respect to most, there was insufficient evidence of violations to support an embargo. Spain, however, was found to have taken approximately 2,500 tons of yellowfin tuna (1.43% above the ceiling of 175,000) out of season. Notice of Embargo, 40 Fed. Reg. 48,159 (1975). This closed-season fishing was found not to be so "frequent and flagrant" as to call for an embargo on all species of tuna from Spain. Notice of Intent and Finding, 40 Fed. Reg. 42,229 (1975). But because the intentional noncompliance necessarily "diminished the effectiveness" of the conservation recommendations, the Commerce Department banned imports from Spain of yellowfin tuna. 40 Fed. Reg. at 48,160. Such was the history of administrative implementation of the Tuna Conventions Act Amendments before the Congress when it considered the Packwood-Magnuson Amendment in 1979.

Finally, Federal Petitioners' reliance (Fed. Br. 30-33) on the "endangered wildlife" amendment to the Pelly Amendment in 1978 is misplaced. It is not an analogue of Packwood-Magnuson. The 1978 amendment was intended to support the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). Congress was well aware that CITES was different from ICRW and lacked any quota-setting mechanism:

> The primary function of [CITES] is to regulate international trade in the species it protects. Its rules, however, apply only to import, export and re-export. *The Convention does not apply * * * to the taking of species*, or to the preservation of habitat.

H.R. Rep. No. 1029, 95th Cong., 2d Sess. 10 (1978) (emphasis added). Accordingly, CITES sheds no light on the interpretation of a statute whose central purpose is to encourage and enforce quota limits.

D. Until Now, the Executive Has Consistently Held that Certification of Intentional Contravention of Fishing Quotas Was Mandatory

Executive Branch practice since 1971 has been consistent; certification has followed quota violation automatically. The practice itself—the enforcement history of the Pelly Amendment from 1971 through 1979— is discussed at pages 21-24 above. But there is more to the story. The Executive vigorously captured the essence of the issue in the context of litigation in 1977 when it represented to the courts that any acquiescence by the United States in a failure to comply with a quota decision would devastate the IWC.

When the IWC established a zero quota for the taking of bowhead whales in 1978 by Alaskan Natives and the United States decided not to object to that decision, the Alaskans sued the Secretary of State to compel him to file an objection. *See Adams* v. *Vance*, 570 F.2d 950, 952 (D.C. Cir. 1978). A U.S. objection would have allowed the taking of only 15-20 whales in the single year of 1978. Yet, the Government contended that the objection, even if later withdrawn, would be a disaster for the international regulatory effort. The Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs testified by affidavit that "A United States objection at this time *would seriously weaken the effectiveness of the International Whaling Commission* as an instrument of conservation." Mink affidavit, ¶¶ 7, 8. (J.A. 138-39) (emphasis added). The United States Commissioner to the IWC in 1977 stated to the Court:

> It seems likely that a United States objection now would:
>
> . . . .
>
> Result in a return at IWC to the approaches of the previous decades, an approach which all agree has brought the virtual demise of the great baleen whales of the Southern Ocean. At worst a United

> States objection could result in the breakdown of IWC. In either case objection at this time would result in the threatened destruction of many whales, endangering the very existence of some species.

Aron affidavit, pp. 9-10 (J.A. 153-54). Lee M. Talbot, senior scientist of the President's Council on Environmental Quality, concluded that the refusal of the United States to abide by the IWC decision would bring "the almost certain collapse of the IWC as an effective mechanism for whale conservation." Statement of Lee M. Talbot (J.A. 158). There is no room to argue that U.S. acquiescence in *four* years of unauthorized whaling by Japan will have any less adverse effect on the authority and prestige of the IWC.

Less than four months before the Baldrige-Murazumi arrangement, the Secretary of Commerce personally confirmed his agreement that violators of the moratorium would lose their U.S. fishing privileges. On June 28, 1984, Senator Packwood wrote to the Secretary as follows:

> It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which continues commercial whaling after the IWC moratorium takes effect would definitely be certified. *I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.*
>
> What I am asking, Mac, is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson.

Letter from Sen. Packwood to Secretary of Commerce (June 28, 1984) (emphasis added) (J.A. 197). The Secretary's July 24, 1984 response stated total, unequivocal agreement:

> You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. *I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC.*

Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984) (emphasis added) (J.A. 198).

The Secretary's commitment on November 13, 1984, not to certify Japan for commercial whaling in violation of the IWC moratoria—whaling that "would clearly diminish the effectiveness of the IWC" in the Secretary's words—cannot be reconciled with the statutory language, with the legislative history, or with 13 years of consistent administrative interpretation.

II. THE COURT OF APPEALS PROPERLY REFUSED TO DISTURB THE EQUITABLE RELIEF GRANTED BY THE DISTRICT COURT

Petitioners also argue that, even if Congress imposed on the Secretary a nondiscretionary duty to certify Japan (Fed. Br. 46-47; J.W.A. Br. 42-49), the judiciary ought not to order the Executive Branch to follow the law. The gravamen of petitioners' arguments is that an international executive agreement has been struck and that should end the matter.[30] As a matter of general jurisprudence, however, the ultimate equity is that Congress intended mandatory certification under Packwood-Magnuson and consequent loss of fishing privileges for violation. As this Court stated in *Virginian Railway Co.* v. *System*

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[30] The major cases cited by petitioners (Fed. Br. 48; J.W.A. Br. 45-47) are inapposite. *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 373 (1955), for example, found equitable relief inappropriate because it was sought "prior to any decision . . . by the Board." *See also Sampson* v. *Murray*, 415 U.S. 61, 63 (1974) (equitable relief inappropriate prior to exhaustion of administrative appeals); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (equitable relief inappropriate in light of an adequate remedy at law).

Federation No. 40, 300 U.S. 515, 551-53 (1937), "the judgment of Congress * * * is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." [31]

Federal Petitioners' more pointed argument that mandamus should have been withheld because the Secretary has undertaken a "solemn agreement between nations" (Fed. Br. at 49) is ominously circular.[32] If that is the law, the Executive Branch could bootstrap itself free of any congressional restraint merely by making an international promise.[33]

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[31] *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975) (equitable discretion must be informed by the purposes of the statute at issue); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 331 (1944) (equitable discretion "must be exercised in light of the large objectives of the Act").

It is nonsense to argue, as Intervenor Petitioners do, that mandamus is inequitable because it punishes Japanese nationals (J.W.A. Br. 48-49). The district court's order imposes no punishment. It merely requires the Secretary to withdraw the privilege of fishing in U.S. waters. Japan will be in no worse position than if the Baldrige-Murazumi arrangement had never existed. It can avoid any impact simply by terminating its commercial whaling. *See* 16 U.S.C. § 1821(e)(2)(C)(ii). Indeed, because of the litigation delay, the Baldrige commitment will have allowed Japanese whalers to take endangered sperm whales for two seasons without certification.

[32] The argument finds no support in the cases cited by Federal Petitioners (Fed. Br. 50); *Weinberger* v. *Rossi*, 456 U.S. 25 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). To the contrary, *Weinberger* v. *Rossi* confirms that executive agreements may not conflict with affirmative expressions of congressional intent found in the legislative history of the relevant statutes, 456 U.S. at 32. So too, *McCullough* refused to extend the National Labor Relations Act to crews working foreign-flag ships because the Court could not find congressional intent to do so in the legislative history of the Act. 372 U.S. at 19-21. *McCulloch* expressly added that its result did not imply "any * * * limitation of the power of Congress" in the field. *Id.* at 22 (quoting *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953)).

[33] Judge Oberdorfer also delicately alluded to justiciability. (Pet. A. 50a-51a). The claim here is not, however, that the courts should

Federal Petitioners are on particularly weak footing to argue (Fed. Br. 47 & n.58) that, even if Packwood-Magnuson requires certification, they owe respondents no "duty" under 28 U.S.C. § 1361 to obey the law. Mandamus has long been available to "any person" who sustains injury when an Executive Officer refuses to perform a nondiscretionary duty. *Garfield* v. *Goldsby*, 211 U.S. 249, 261 (1908) (quoting *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1875).[34] And no case holds that the type of injury required to invoke mandamus differs from the type of injury required to provide standing to sue in the first place. Respondents, whose domestic and worldwide activities concerning whales and whaling (Amended Complaint ¶¶ 3-15) readily distinguishes them from persons merely "interested" in whales (Fed. Br. 47, n.58), plainly meet this Court's requirements for standing. *See, e.g., Duke Power Co.* v. *Carolina Envt'l Study*

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review a foreign affairs decision within the sound discretion of the Executive; it is rather whether the Secretary breached the limits of the statutory authority which Congress gave him. If we are right that the duty to certify was mandatory then there is no doubt that the matter is justiciable for who is to make the determination of what the law means if not the courts? *See Baker* v. *Carr*, 369 U.S. 186, 211 (1962) ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

[34] *Heckler* v. *Ringer*, 466 U.S. 602 (1984), cited by Federal Petitioners (Fed. Br. 47) is not to the contrary. That decision merely holds that mandamus will not lie when litigants have an adequate remedy at law under the administrative appeals procedures in 42 U.S.C. § 405(g), (h). So too, Federal Petitioners' reliance (Fed. Br. 47 n.58) on *Federal Election Comm'n* v. *National Conservative Political Action Committee*, 105 S. Ct. 1459 (1985), is misplaced. This decision, which does not involve mandamus, merely holds that litigants enjoy no private right of action under the Federal Election Campaign Act in light of the Federal Election Commission's "exclusive jurisdiction with respect to civil enforcement" in 2 U.S.C. § 437c(b)(1). Significantly, the Court held that the private litigants could sue the FEC "to implement or construe the Act." 105 S. Ct. at 1464.

Group Inc., 438 U.S. 59, 80-81 (1978); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 684-88 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-32 (1972).[35]

Contrary to the assertion of Federal Petitioners (Fed. Br. 50), the use of mandamus to ensure Executive Branch compliance with Congress' commands hardly depends on "finespun judicial definitions of 'mandatory and nondiscretionary' duties." A duty is no less mandatory simply because a statute's legislative history must be consulted. As this Court has long established, the existence of a duty enforceable by mandamus may be ascertained by an examination of previous legislation, the "mischief [the statute] was intended to correct and its legislative history," *Work* v. *United States ex rel. Lynn*, 266 U.S. 161, 167 (1924); *See Work* v. *United States ex rel. Rives*, 267 U.S. 175, 178 (1925); *Roberts* v. *United States*, 176 U.S. 221, 231 (1900).[36]

Finally, Federal Petitioners' fear that mandamus under Packwood-Magnuson would open the door to mandamus across the spectrum of foreign affairs is as hyper-

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[35] Even apart from the mandamus statute itself, a mandatory injunction to compel the Secretary's obedience to nondiscretionary duty is authorized in this case under two sections of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 703 (writs of mandatory injunction); § 706 (order to compel agency action unlawfully withheld). Respondents brought this case seeking relief under the APA, as well as seeking a writ of mandamus under 28 U.S.C. § 1361. To this date, petitioners have not challenged, as they cannot, respondents' standing under 28 U.S.C. § 1331 to seek the relief afforded under the APA. *See, e.g., Duke Power Co.* v. *Carolina Envt'l Study Group*, 438 U.S. 59, 81 (1978); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

[36] *See also* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 337 (1967).

bolic as it is mistaken.[37] Packwood-Magnuson speaks in its own special terms. It is a declaration by Congress that the privilege granted to foreign nations to fish in U.S. waters is to be revoked in the case of a nation which violates IWC whaling quotas. The implementation of this clear legislative command would scarcely constitute an open-ended invitation to judicial intervention in truly discretionary foreign affairs functions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 29, 1986

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[37] The only example given by petitioners (Fed. Br. 50 n.61) involves the phrase "gross violations of internationally recognized human rights" in 22 U.S.C. 2151n. Yet the legislative history of this provision states clearly that "[t]he language does not seek to define what the U.S. Congress believes is acceptable practice by other governments in their internal affairs." S. Rep. No. 406, 94th Cong., 1st Sess. 36 (1975).

FOR ARGUMENT

(7) (7)

Nos. 85-954 and 85-955

Supreme Court, U.S.
FILED
MAR 29 1986
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

MALCOLM BALDRIGE, ET AL., PETITIONERS,

v.

AMERICAN CETACEAN SOCIETY, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

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March 29, 1986

CORRECTED COPY

25pp

QUESTIONS PRESENTED

1. Does the political question doctrine preclude judicial enforcement of a statutory requirement imposed upon the Secretary of Commerce, an executive branch official, in an area which may affect on foreign relations?

2. Where a congressional enactment may have some impact on international relations, is it improper for a court to consider a statute's legislative history in determining Congressional intent?

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In the Supreme Court of the United States

OCTOBER TERM, 1985

NOS. 85-954 AND 85-955

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES AS AMICI CURIAE

The Speaker and Bipartisan Leadership Group of the House of Representatives respectfully submit this brief as *Amici Curiae* in support of the respondents' position that the decision of the Court below should be affirmed. In an

effort to strengthen the schedules and programs of the International Convention for the Regulation of Whaling ("ICRW"), the Congress deemed it appropriate to enact legislation that would enforce compliance with these otherwise unenforceable international agreements. The resultant statute provides for economic sanctions against any nation that fails to cooperate with the conservation measures adopted by the International Whaling Commission ("IWC"). At issue here is the failure of the Secretary of Commerce to impose the statutorily decreed sanction, a percentage reduction of the noncooperating nation's fishing allocation within the territorial waters of the United States.

The Courts below found that pursuant to the Pelly and Packwood-Magnuson Amendments, 22 U.S.C. § 1978 (1982); 16 U.S.C. § 1821(e)(2) (1982), the Secretary of Commerce was under a mandatory duty to certify Japan as having diminished the effectiveness of the ICRW and, once having certified, was then under an obligation to impose the fishing allocation reduction sanction provided for by law. The District Court's order was stayed pending appeal and after the Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision, this Court granted certiorari.

The petitioners contend that the decision below erroneously interprets the relevant statutory language as depriving the Secretary of Commerce of discretionary authority with respect to such certifications. Petitioners further contend that it is improper for the judiciary to enforce, by the issuance of a writ of mandamus, compliance by executive branch officials with mandatory prescriptions of statutes affecting foreign relations.

INTEREST OF THE AMICI CURIAE

This is a case in which the court below identified "[t]he fundamental question" as "one of statutory interpretation." *American Cetacean Society* v. *Baldrige*, 768 F.2d 426, 432 (D.C. Cir. 1985). Resolution of the questions presented to the Court, however, may implicate Constitution-

al concerns, the importance of which extend far beyond the interpretation of this particular statute. The Speaker and Bipartisan Leadership Group of the United States House of Representatives ("House amici") do not address the proper reading of the statute. Rather than join in the debate on statutory interpretation, the House amici submit their views on two limited, but vitally important, aspects of the case. These two aspects pose, in the considered opinion of the House amici, a significant threat to the vitality of the separation of powers doctrine and to the future proper functioning of our government.[1]

The two aspects which demand the attention of the House amici are novel theories of separation of powers, initially voiced by the dissenting member of the panel of the Court of Appeals and now presented to this Court indirectly by the Executive and more openly by the Japanese petitioners. The first theory is that the judiciary should, as a matter of discretion, refuse to entertain legal actions which seek to mandate executive branch compli-

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[1] Participation by the Speaker and Bipartisan Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., Synar* v. *United States*, No. 85-3945 (D.D.C. Feb. 7, 1986), *appeal pending sub nom. Bowsher* v. *Synar*, Nos. 85-1377, 85-1378, 85-1379 (U.S. oral arg. scheduled Apr. 23, 1986); *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985), *appeals argued*, Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985); *Lear Siegler, Inc.* v. *Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984), *appeal argued*, No. 84-2805 (9th Cir. July 10, 1985). In this filing, Speaker Thomas P. O'Neill, Jr., is joined by Majority Leader Jim Wright, Republican Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Republican Whip Trent Lott.

In light of the institutional nature of this participation and the status of the House of Representatives in the government of the United States, it would appear appropriate for the Speaker and elected leadership of the House of Representatives to be permitted to avail themselves of the right to submit a brief as *amici curiae* without the consent of the parties, in accordance with the provisions of Sup. Ct. R. 36.4. In this instance, written consent has, nonetheless, been obtained and copies of the consent letters have been filed with the Clerk of the Court.

IN THE

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OCTOBER TERM, 1985

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MALCOLM BALDRIGE, *et al.*,
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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

COUNTER-STATEMENT OF THE CASE

I. THE MODERN DECIMATION OF THE WORLD'S GREAT WHALES

A century and a quarter ago, Herman Melville wondered whether, "Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters." [1] History has borne out Melville's fears. In 1970 the Secretary of

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[1] H. Melville, *Moby Dick* 491 (Macmillan Co., N.Y. 1962) (1st ed. 1851).

the Interior listed eight species of great whales—including the sperm whale of Melville's *Moby Dick*—under the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969). 35 Fed. Reg. 18,319, 18,320 (1970).[2]

The destruction of the great whales is an event of our age. The masthead lookouts of Melville's day have been replaced by sonar and helicopters, the oared longboats with high-powered catcher ships.[3] The reproductive abilities of the whales, however, remain fixed to a slower biological clock. A female sperm whale evidently can bear one calf every three years; the calf, if it survives, may not reach breeding status itself for ten to thirty years.[4]

The slow reproductive and growth rates of the whales, and the increased killing capabilities of Twentieth Century whaling ships, combined in a predictably tragic fashion. The blue whale, the largest animal known to evolutionary history, merely thirty years ago was thought capable of sustaining an annual catch of about 1,200 animals. Today, scientists believe there are so few of these creatures that males and females may not be able to find each other across the vastness of the oceans.[5] The right whale, so named because its slow swimming

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[2] The term "great whales" is often used to describe the ten largest species of the order Cetacea that have been, or are now, commercially hunted. Most species are classified as "baleen" whales because of the large plates of baleen (or "whalebone") through which the animals filter their diet of small, shrimp-like crustaceans and other small marine organisms; only one of the great whales, the sperm whale, is a toothed whale. *See* S. McVay, *The Last of the Great Whales*, 215 *Scientific American* 13, 14-15 (1966).

[3] *See generally*, J. Tonnessen, A. Johnsen, *The History of Modern Whaling* 609-37 (1982); Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, (Part One) 6 Ecology L.Q. 323, 359 & nn.175 & 176 (1977).

[4] Scarff, *supra*, n.3, at 335 & 337.

[5] G. Small, *The Blue Whale*, 70-71 (1970).

once made it the "right" whale to kill, has had to be protected by a complete moratorium since 1940. Most of its scattered groups have not appreciably increased for the past forty years.[6]

II. THE INTERNATIONAL EFFORT TO REGULATE WHALING

The International Convention for the Regulation of Whaling ("ICRW" or "Convention"), which created the International Whaling Commission ("IWC"), was signed in 1946 and entered into force on November 10, 1948. In its early years, the IWC served as little more than a cartel to stabilize whale oil prices (J.A. 150).[7] This was accomplished in the 1950's and 1960's through the establishment of overall yearly quotas, expressed in terms of "blue whale units," which allowed member nations to kill freely whichever species they chose. *See* 62 Stat. 1716, 1724 (1946). The result was biological disaster. Yet, despite repeated warnings from scientists during these decades that whale populations had reached dangerously low levels,[8] the IWC was paralyzed. When conservation amendments were adopted, the amendments had no sanctions. Resistant members could file objections,[9]

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[6] *Id.* at 3-4; NOAA, 46 Marine Fisheries Review, No. 4 at 43 (1984).

[7] "J.A." and "A.A." refer to the Joint Appendix and the Appellees' Appendix filed in the Court of Appeals, copies of which have been lodged with the Clerk of this Court. "Pet. App." refers to the appendix to the petition for certiorari in No. 85-955. "Fed. Br." refers to the brief filed in No. 85-955 by the Federal Petitioners. "J.W.A. Br." refers to the brief filed in No. 85-954 by the Japan Whaling Association, Petitioners.

[8] *See, e.g.*, N. Mackintosh, *The Stocks of Whales* 180 (1965); Scarff, *supra* n.3, at 358-66.

[9] In 1964, the IWC voted to protect the blue whale in the Antarctic. Japan objected. Other nations followed its lead. Scarff, *supra* n.3, at 364. The protection effort collapsed.

or even withdraw temporarily from the Convention, with impunity.[10]

It was not until the early 1970's that the IWC began to shift toward quotas for individual species and abolished the blue-whale-unit system. *Circular Communications to All Contracting Governments*, Oct. 5, 1972, 23 U.S.T. 2820. By that time several species of the world's largest whales, including the blue and humpback whales, had been driven to "commercial extinction"—their numbers so decimated by unrestrained slaughter that it was no longer economical to hunt for them (J.A. 148, 127).

III. THE DETERMINATION OF THE U.S. CONGRESS TO SUPPORT IWC QUOTAS—THE PELLY AND PACKWOOD-MAGNUSON AMENDMENTS

The Congress of the United States was in the forefront of the drive for effective whale conservation through the instrumentality of the Convention. At the outset, it authorized and established the principles governing United States participation in the Convention, and provided for the appointment of the Commissioner. Whaling Convention Act, 48 Stat. 2090, 16 U.S.C. § 916 *et seq.* (Aug. 9, 1950). In 1971, both the House and the Senate passed resolutions calling for an international whaling moratorium. S.J. Res. 115, 92nd Cong. 1st Sess. (1971); H.Con. Res. 387, 92d Cong., 1st Sess. (1971). *See* 117 Cong. Rec. 38,537-40 (1971). And in reaction to the devastation of the great whales—and to the collapse of the Atlantic salmon—Congress also adopted the 1971 Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978. Congress' intent was plain from the beginning. It was determined to put teeth into the international control of whaling through the Convention process; it explicitly rejected the methods of bilateral diplomacy, with their traditional tradeoffs and compromises.

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[10] Japan withdrew temporarily from the Convention in 1959 over quota disagreements. Scarff, *supra* n.3, at 361 & n.196.

Under Pelly, so far as the record of congressional understanding shows, from 1971 to 1979 every country which violated whale quotas set by the IWC was certified. In each instance, quota violations were determined by the Executive Branch to "diminish the effectiveness" of the International Whaling Convention.

In 1974, the Secretary of Commerce made the first certifications under the Pelly Amendment (J.A. 168-72). Both Japan and the Soviet Union had objected, as permitted by the Convention, to an IWC total quota of 5,000 minke whales for the 1973-74 Antarctic season (J.A. 170). When the Soviet Union took 4,000 minke whales and Japan took 3,713, the Secretary certified that both countries had acted to "diminish the effectiveness" of the IWC program. *Id.* President Ford made clear in his subsequent message to Congress that a taking of whales in excess of IWC quotas would bring the Pelly Amendment into play:

> Objections to adopted quotas are permitted by the terms of the Convention. An objecting country is not legally bound by the quota. Whether or not the objection is legal, however, does not alter the fact that *exceeding the quotas will diminish the effectiveness of the program. It constitutes a prima facie case for application of the Pelly Amendment.*

White House Press Release, January 16, 1975 (J.A. 175) (emphasis supplied).

In late 1978, the Secretary of Commerce certified Chile, Peru and the Republic of Korea for exceeding IWC quotas. Letter from Secretary of Commerce to the President (Dec. 14, 1978) (J.A. 177-86). None of the three countries were IWC members at the time. *Id.* The threatened imposition of Pelly Amendment sanctions brought commitments from all three nations to join the IWC by the next annual meeting. President's Report to Congress on the Certification of Chile, Peru and the Republic of Korea, at 3 (J.A. 193, 195).

Yet Congress was not satisfied. The President had exercised his discretion in all five cases to withhold the import ban. See 22 U.S.C. § 1978(a)(4). Congress wanted automatic certification *and* automatic sanctions. So it determined to close the loophole in Pelly by the Packwood-Magnuson Amendment, 16 U.S.C. § 1821(e)(2). Its object was bold. It wanted nothing less than to stop whaling in derogation of IWC quotas everywhere in the world.

As the Packwood-Magnuson hearings and debates make crystal clear, Congress knew what it was doing. It realized it would affect United States relations with other countries by cutting off the Executive Branch's ability to compromise whale conservation in the interest of other foreign policy concerns. Indeed, this was Congress' avowed purpose. Packwood-Magnuson was a conscious decision by the Legislative Branch sharply to limit the discretion of the Executive in order to ensure the effectiveness and integrity of the Convention process.

The Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 405, 93 Stat. 395, 403 (1979), was approved on the same day as the Packwood-Magnuson Amendment, Pub. L. No. 96-61, 93 Stat. 407 (1979). In the first, Congress again asked the IWC to agree to a "moratorium on the commercial killing of whales." 93 Stat. 403. Pub. L. No. 96-60 identified several foreign countries, including Japan, as offenders against the effort to stop whaling and urged them to comply voluntarily with the moratorium. 93 Stat. 404.

Packwood-Magnuson was a companion piece to the declaration in Pub. L. No. 96-60. It made clear that there would be a price to nations which chose not to comply with IWC quotas—the loss of fishing privileges in the fishery conservation zone off the coasts of the United States.

IV. THE IWC MORATORIA

Congress acted none too soon. By the 1970's, it had become apparent that the long-term effects of earlier whaling had been even more devastating than anticipated, and that too little was known about how—or even whether—the remaining populations could manage to survive.[11]

A. The Sperm Whale Ban

The ominous gaps in man's knowledge of whale demographics was most evident in the case of the Western Division Stock of North Pacific sperm whales—the very stock harvested to this day by the Japanese under the Baldrige-Murazumi agreement at issue here. As early as 1971, the IWC's Scientific Committee concluded that existing population models were flawed and that in fact the male sperm whale population had fallen to levels at which there appeared to be "little or no further surplus." [12] In 1976, the Scientific Committee was unable to establish firm quotas for male sperm whales; [13] based on the fragmentary data that did exist, the IWC adopted an interim "zero" quota for adult males and allowed a limited harvest of 763 adult females.[14] In 1979, the lack

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[11] It became increasingly suspected, for example, that whales belonging to different stocks and sub-populations of one species did not interbreed, thereby making the overall number of whales of one species a crude and misleading measure of reproductive potential. *See, e.g.*, Scarff, *supra* n.3, at 334-35 and nn.26-28.

[12] 22nd Annual Report, Int'l Whaling Comm'n, Scientific Committee, Summary and Recommendations to the Commission, Section B, ¶¶ 7, 9 (1972).

[13] 28th Annual Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(ii)(c) (1978).

[14] *Ibid.* These interim quotas stood in marked contrast to the quotas established only several years earlier: 4,000 males and 6,000 females. See 24th Annual Report, Int'l Whaling Comm'n, Appendix III, Chairman's Report ¶ 18 (1974).

of validated population models and apparent reductions in pregnancy rates led to a "zero" quota for females [15] and to a proposal, which failed of adoption, for a three-year moratorium in light of the "scientific uncertainty and the amount of biological material still remaining to be analyzed." [16]

In 1981, the IWC finally voted to reduce the quota for the Western Division Stock of North Pacific sperm whales from 890 adult males to zero adult males (J.A. 65a). It also voted to amend the Schedule to provide that no sperm whales could be taken from the North Pacific Stock in any future year unless the IWC acted to establish a quota for that year.[17]

The vote on these proposals was 25 to one, with Japan casting the only vote in opposition (J.A. 129).[18] Japan then filed its formal objection to the amendment.

B. The General Moratorium

The lacunae in biological information made the determination of sustainable yields unreliable for other species as well.[19] Yet, during the 1970's, the IWC continued

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[15] 30th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 10.2 (1980).

[16] *Id.* at ¶ 10.

[17] Under previous IWC procedure, the absence of a quota for a particular year ordinarily would mean either that whaling for that species or stock was unrestricted or that the previous year's quota remained in effect.

[18] *See Review of the 33rd International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981).

[19] A case in point involved Bryde's whales. In 1975 the Scientific Committee drew attention to the critical lack of information on Bryde's whales in the North Pacific—a stock now open to Japanese hunting under the Baldrige-Murazumi exchange. 27th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 8 (1976). In 1976 and

to permit the taking of species and individual stocks under specific numerical quotas. Although the quotas were a desperately needed improvement over the disastrous blue-whale-unit system, there developed a growing concern that even scrupulous adherence to the quotas could not guarantee the long-term survival of the whales.

At its July 1982 annual meeting, therefore, the IWC took the supreme, culminating regulatory step. It ordered a moratorium on all commercial whaling, which had been long sought by the Congress, to commence in 1986. A three-year phase-in was allowed, in a major concession to accommodate the objections of the whaling nations.[20] And as a further compromise, Japan was granted a two-year relief period—for the 1982-1983 and 1983-1984 seasons—from the IWC's decision in 1981 to ban sperm whaling in the North Pacific on the Western Division Stock.[21]

1977, the IWC was forced to set a "zero" quota for Bryde's whales in the Southern Hemisphere "pending a satisfactory estimate of stock size." 28th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 9(i)(d) (1978); 29th Report, Int'l Whaling Comm'n, Chairman's Report ¶ 11(i)(d) (1979).

[20] Dr. John Byrne, the Administrator of NOAA and U.S. Commissioner to the IWC at the time, stated that the IWC "went to considerable lengths to ease the problems which cessation of whaling would bring to the whaling nations. Not only was the starting date set for 1986 (the '85-'86 Antarctic season), but it was agreed to review the situation in 1990 to determine whether it is workable." 8 *Marine Mammal News*, No. 7, at 2 (July 1982). *See* United States Marine Mammal Comm'n, Annual Report to Congress, Calendar Year 1982, at 24.

[21] The United States Marine Mammal Commission described the "compromise" nature of Japan's two-year sperm whaling allocations in its 1982 Report to Congress, *id.* at 25; *see also Review of the 34th International Whaling Comm'n Meeting, Hearings before the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. 17-18 (1982) (committee staff report).

The IWC's moratorium was described by NOAA Administrator Byrne as "unmatched in the [IWC's] history" and as the "best evidence we could have that whales will receive that protection we have urged for so long." [22]

On October 21, 1982, Japan filed its objection to the moratorium.

V. JAPAN'S DEFIANCE OF THE IWC'S DECISION AND THE UNITED STATES' RESPONSE

A. Secretary Baldrige's Position Prior to November 1984

Japan continued to take sperm whales in the 1982-83 and 1983-84 seasons. Its objection to the original ban remained in effect. Japan gave every indication of defying the decision of the international community to desist from further whaling. Accordingly, on June 28, 1984, as the 1984-85 sperm whale "season" drew near, Senator Robert Packwood wrote to Secretary Baldrige seeking assurances that the Secretary would certify any commercial whaling that occurred after the IWC moratorium took effect (J.A. 197). Secretary Baldrige responded that certification would be forthcoming, "since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC." (J.A. 198). Letter from Secretary of Commerce to Sen. Packwood (July 24, 1984).

B. Mr. Baldrige's Deal with Japan

The Secretary changed his mind, however, in less than four months. In the November 13, 1984 Baldrige-Murazumi exchange he agreed not to certify just such a "foreign government." Altogether, his letter constituted a special license to Japan to kill 1,200 sperm whales from

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[22] Statement of Hon. John V. Byrne, *Review of the 34th IWC Meeting, supra* n.21, at 31-32.

the protected Western Division stock between 1984 and 1988, and untold thousands of minke and Bryde's whales, all in palpable violation of the IWC decision.[25]

The step was without precedent. Never before had an Executive Branch official purported to suspend the operation of Pelly or Packwood-Magnuson as to an admitted violation of any whaling quota—and certainly not with respect to the supreme regulatory act of a worldwide moratorium.

In exchange for the Secretary's forbearance, Japan agreed to withdraw its objections—effective 1988—to the IWC's 1981 sperm whale ban and 1982 general moratorium (Pet. App. 102a-119a). But contrary to petitioners' representations, Japan did *not* agree to "dismantle its commercial whaling *industry*" (Fed. Br. 13). It is already pressing to ensure that the IWC completes its reevaluation, as contemplated in the IWC Schedule par. 10(e), by 1990, in the evident hope that the moratorium on commercial whaling may come to an end and its "industry" continue. Even as to interim whaling between 1988 and 1990, it is by no means certain that Japan's "industry" will be shut down. Within weeks of the Baldrige-Murazumi agreement, Japan proposed to an IWC Working Group a new category of sperm and Bryde's whaling off its coast that would be called "coastal subsistence whaling" instead of "commercial"

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[25] Federal Petitioners' argument (Fed. Br. 43 n.50) that the killing of these whales is a "prudent price to pay" has little factual support. The IWC's Scientific Committee, so heavily relied on by petitioners (Fed. Br. at Addendum II), concluded that it was "unable to agree on what the long term effects" on the sperm whale population were likely to be. Yet it is precisely such long-term effects that are of crucial concern to a species listed as endangered with worldwide extinction. See Respondents' Motion to Expedite, 85-954, 85-955, Exhibits B & C. It is significant that petitioners fail to offer even short-term comfort from the Scientific Committee as to Japan's killing of 357 Bryde's and 1,941 minke whales during each of the 1986 and 1987 seasons.

whaling and hence not be covered by either the 1981 sperm whale ban or the 1982 general moratorium. *See* Brief in Opposition to Petition for Writ of Certiorari. Nos. 85-954, -955 at 4 n.2. And Japan may well issue itself a permit for "scientific" whaling, as it has in the past, *see Scarff*, *supra* n.3, at 356 n.157, and as to which there is no control under the Convention. Moreover, Secretary Baldrige has already stated that fishing activity by United States citizens is expected to increase considerably by the end of the decade, displacing foreign fishing in U.S. waters (J.A. 111). Thus, Japan will have far less to lose from invocation of Packwood-Magnuson in 1988 than it does today.

As the Baldrige-Murazumi agreement was being negotiated, respondents, a consortium of twelve nonprofit conservation and animal welfare organizations and one individual, filed this complaint. On March 5, 1985, the district court ordered Secretary Baldrige to fulfill his statutory obligations and to certify Japan (Pet. App. 56a-84a). On August 6, 1985, the Court of Appeals affirmed (Pet. App. 1a-55a).

SUMMARY OF THE ARGUMENT

The controlling issue is whether under the 1979 Packwood-Magnuson Amendment the Secretary of Commerce may determine that Japan's refusal to abide by the IWC's worldwide moratoria did not diminish the effectiveness of the Whaling Convention.

The plain language of the statute is otherwise; a flagrant violation of the IWC's moratoria, the supreme and culminating regulation of commercial whaling, must by definition diminish the Convention's effectiveness. The Executive Branch has told the courts that even lesser quota violations would. Respondent Baldrige himself has written the author of Packwood-Magnuson that he agrees.

That Amendment was enacted against a background of administrative practice under the Pelly Amendment that quota defiance consistently triggered automatic certification. Congress, in enacting Packwood-Magnuson, sought and obtained from the Department of Commerce assurance that such defiance would continue to be certified as "diminishing the effectiveness of the Convention." The central purpose of Packwood-Magnuson was to eliminate the loophole in the Pelly Amendment to which the Executive Branch had regularly resorted to withhold sanctions from certified countries—not to create a new loophole. The Executive plea at the time for "some flexibility to respond proportionally to the nature and scope of the particular offense" was rejected. Respondent Baldrige's contention now that he has discretion to withhold sanctions is an effort to confer on himself the very discretion his predecessor sought and was denied when Congress passed Packwood-Magnuson. The use of the phrase "diminish the effectiveness" in other statutes supports Congress' intention in Packwood-Magnuson.

The Secretary also suggests, as a fallback, that the courts should desist from enforcing even an unqualified congressional mandate if that mandate touches international relations. The notion is without precedent, and ominous in its implication that the Executive Branch can slip the congressional bridle by making agreements with other nations.

ARGUMENT

I. SYSTEMATIC DEFIANCE OF THE IWC MORATORIA IS A PER SE DIMINISHMENT

A. The Executive Branch Is Not Above the Law Just Because Its Action Affects Foreign Affairs

Justice Jackson said that the foreign affairs authority of the Executive Branch is "at its maximum . . . [when done] pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). It

enactments affecting foreign affairs are nonjusticiable. Second, they have suggested that even if such statutes are justiciable, they should be denied the benefit of the ordinary rules of statutory construction. The Court should recognize the pernicious nature of these theories and the far-reaching harm to our system of government which could ensue from their acceptance. The House amici urge the Court to uphold the powers and dignity of both the Legislature and the Judiciary by categorically rejecting these novel theories.

Respectfully submitted,

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